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402789
Sup Ct
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 46

**STATE OF WISCONSIN AND ELMER E. BARLOW,
AS COMMISSIONER OF TAXATION OF THE
STATE OF WISCONSIN, PETITIONERS,**

vs.

J. C. PENNEY COMPANY

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN**

PETITION FOR CERTIORARI FILED APRIL 19, 1940.

CERTIORARI GRANTED MAY 29, 1940.

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RASKOPF, A. J.—

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**STATE OF WISCONSIN
IN SUPREME COURT**

AUGUST TERM, 1939.

No. 96

**J. C. PENNEY COMPANY, a foreign corpora-
tion,**

Appellant,

vs.

WISCONSIN TAX COMMISSION,

Respondent.

CASE

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Record.

This is an appeal from a judgment rendered in the Circuit Court for Dane County, Wisconsin the Honorable August C. Hoppmann presiding, on the 10th day of June, 1939, which said judgment confirmed an order of the Wisconsin Tax Commission dated July 21st, 1938 which levied an assessment upon the appellant under the so-called Wisconsin Privilege Dividend Tax law in the amount of \$23,586.79.

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1-110 Record of Proceedings Before the Wisconsin
Tax Commission, (included in subsequent portion
of printed case).

111-126 NOTICE OF APPEAL TO THE CIR-
CUIT COURT FOR DANE COUNTY,
WISCONSIN, FROM DECISION AND
ORDER OF THE WISCONSIN TAX
COMMISSION.

(Title omitted.)

111 *To the Wisconsin Tax Commission,
Madison, Wisconsin:*

PLEASE TAKE NOTICE that **J. C. PEN-
NEY COMPANY** hereby appeals to the Circuit
Court for Dane County, Wisconsin, from the
whole of the order and decision of the Wisconsin
Tax Commission which was served by registered
mail upon the appellant on July 25th, 1938 and
which bears date of the 21st day of July, 1938, a
copy of which said order and decision is hereto
attached, marked Exhibit No. 1 and is hereby re-
ferred to and made a part of this notice.

**OBJECTIONS TO ORDER AND DECI-
SION AND TO ASSESSMENT MADE.**

The objections to the said order and decision
and to the assessment therein made, are stated
as follows:

(1) That said assessment is void and of no
effect whatsoever by reason of the fact that the

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purported law on which the said assessment was based, as applied by the Wisconsin Tax Commission to the J. C. Penney Company, is unconstitutional under both the Constitution of the United States of America and the Constitution of the State of Wisconsin, and particularly under the 112 Fourteenth Amendment of the Constitution of the United States of America; Article I, Section 1, Constitution of the State of Wisconsin; Article I, Section 8, Constitution of the United States of America; Article I, Section 10, Constitution of the United States of America; Article I, Section 8, Constitution of the State of Wisconsin; Article I, Section 12, Constitution of the State of Wisconsin; Article IV, Section 1, Constitution of the United States of America.

**STATEMENT OF FACTS UPON WHICH
APPELLANT BELIES AS CONSTITUTING
BASIS OF THIS APPEAL.**

As appears from the record herein made before the Wisconsin Tax Commission, the J. C. Penney Company is a Delaware corporation having its statutory office at Wilmington, Delaware. It is engaged in the business of operating a nationwide chain of approximately fifteen hundred retail department stores; its principal executive office is in New York City, New York. It is qualified to do business in the State of Wisconsin but has no executive office of any kind located within the State of Wisconsin. During the year 1934 it operated forty-seven

stores in this state. In 1935 and 1936 it operated forty-eight stores in Wisconsin. During the year 1934 J. C. Penney Company had a total net income computed on a Wisconsin tax basis of \$16,022,607.00 and in 1935 a total net income of \$15,223,478.00 derived from business transacted in all forty-eight states. Under the formula set forth in the Wisconsin income tax law \$562,331.00 of the above net income for 1934, and \$587,001.00 of the above net income for 1935, was allocable to Wisconsin as income derived from business transacted in that state, and J. C. Penney Company paid a Wisconsin income tax for the years 1934 and 1935 based upon these figures.

On December 31, 1935 J. C. Penney Company declared a dividend of \$2.25 per share, making
113 total dividend payments of \$5,555,214.00

In 1936 J. C. Penney Company declared and paid the following dividends:

Date Paid	Amount Per share	Total Amount Paid to Stockholders
3/31/36	\$.75	\$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

By a notice of additional assessment dated July 16, 1937, the Wisconsin State Tax Commission assessed a privilege dividend tax in the principal amount of \$22,696.37, together with interest and penalties of \$1,495.20, making a total of \$24,191.57 against J. C. Penney Company.

This assessment was made pursuant to Chapter 505 of the Wisconsin Laws of 1935 effective September 26, 1935, as amended by Chapter 552 of the Laws of 1935 effective October 9, 1935, Chapter 233 of the Laws of 1937 effective June 15, 1937, and Chapter 309 of the Laws of 1937 effective July 1, 1937. The Wisconsin Tax Commission, using the income tax figures set forth above, ascertained that the percentage of the 1934 income allocable to Wisconsin was 3.5096% and that the percentage of 1935 income so allocable to the State of Wisconsin was 3.8558%. After multiplying total dividends paid in 1935 by .035096, and total dividends paid in 1936 by .038558, the resulting figures were multiplied by the rate of tax fixed by the State Tax Commission (.025641) and penalties and interest were added, the final figure being the amount of the assessment. Under the decision of the State Tax Commission on July 21, 1938 the rate of tax fixed by the State Tax Commission was reduced from .025641 to .025, reducing the principal amount of the tax assessed to \$22,128.97 and reducing the interest and penalties to \$1,457.82, making a total of \$23,586.79.

The J. C. Penney Company duly filed its application for hearing, and objection to assessment, within the period allowed by law.

The following are certain of the details with
114 respect to J. C. Penney Company's manner of conducting its operations and disbursing its funds. The total proceeds from sales of goods

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in Wisconsin stores and in stores in all other states are deposited in local banks. From such accounts payments are made for payrolls, rents, advertising and other local expenses. The balance not needed to meet such expenses is transmitted to regional depository banks, from which banks the moneys are transmitted by checks or drafts drawn by the Treasurer's office in New York City, and the money is deposited in New York banks to the general credit of J. C. Penney Company. No one in Wisconsin has any authority to draw upon any moneys deposited in a regional depository bank. The moneys after leaving the local banks completely lose their identity as moneys derived from any particular source. The funds so deposited to the credit of the company in New York are used to pay salaries, general overhead expenses of the New York and other offices, taxes and dividends. Checks are also drawn upon the New York accounts in payment for merchandise purchased from all sources, and shipped to the various stores of the company, including those in Wisconsin. All of the stock books, minute books, and secretary's records of the company are kept within the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that state. All transfers of shares of the company are made in New York by the transfer agent of the company, Chemical Bank and Trust Company. All directors' and stockholders' meetings of J. C. Penney Company are held in the State of New York, and the dividends

involved in this assessment were declared at directors' meetings held at the principal offices of the company at 330 West 34th Street, New York City. The actual payment of such dividends was effected by the executive officers of the company, who caused checks to be drawn upon the accounts of J. C. Penney Company in its New York banks payable to the stockholders of record upon each dividend record date. Such checks were placed in envelopes addressed to each stockholder of record upon each dividend record date at his address, as the same appeared upon the records of the company, and were duly mailed from the Post Office in New York City. All of the books and records of the company used in the payment of such dividends were situated in the State of New York. No act in connection with the the payment of the dividends in question was performed within the State of Wisconsin and no act in connection with the receipt of such dividends was performed in Wisconsin, except that certain of the stockholders of the company receive their mail in this state.

Computations, schedules and testimony were introduced at the time of hearing before the Tax Commission which showed that there were 391 stockholders who were residents of the State of Wisconsin as of the date of the payment of the December 31, 1935 dividend, as against a total of 12,385 stockholders. The proofs and testimony further show that with respect to the dividend paid under date of March 31, 1936 there were

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393 stockholders residing in Wisconsin as against a total of 12,687 stockholders; that with respect to the dividend paid on June 30, 1936 there were a total of 401 stockholders who were residents of Wisconsin as against a total of 12,927 stockholders; that with respect to the dividend paid on September 30, 1936 there were 405 Wisconsin stockholders out of a total of 13,066 stockholders; that with respect to the dividend paid on December 15, 1936 there were 406 Wisconsin stockholders as against a total of 13,281 stockholders.

116 The application for hearing and the proofs before the Tax Commission at the hearing further showed in tabulated form as hereinafter more particularly set forth, (1) the total amounts received by Wisconsin residents on the payment of the above dividends, (2) the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (this is calculated by the use of the percentages used by the Tax Commission in reaching its assessment), and (3) the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings, namely:

Dividend Date	(1)	(2)	(3)
12/31/35	\$74,065.50 x .035096	\$2,599.40 x .025641	\$66.65
3/31/36	24,814.50 x .038558	956.80 x "	24.53
6/30/36	25,320.00 x "	976.29 x "	25.03
9/30/36	34,097.00 x "	1,314.71 x "	33.71
12/15/36	133,147.25 x "	5,133.89 x "	131.64
		Total	\$281.56

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The above figures represent the face amount of tax without penalties or interest. Furthermore, the Tax Commission has conceded that the rate upon which computation should be made upon any dividends that are paid and which are taxable should be a straight $2\frac{1}{2}\%$ rate rather than .025641, so that on the basis of the straight $2\frac{1}{2}\%$ rate the tax without penalties on the amounts received by Wisconsin residents allocable to Wisconsin earnings, on the basis used by the Tax Commission, would be:

Dividend Date	(1)	(2)	(3)
12/31/35	\$74,065.50 x .035096	\$2,599.40 x $2\frac{1}{2}\%$	\$64.99
3/31/36	24,814.50 x .038558	956.80 x "	23.92
6/30/36	25,320.00 x "	976.29 x "	24.41
9/30/36	34,097.00 x "	1,314.71 x "	32.87
12/15/36	133,147.25 x "	5,133.89 x "	128.35
		Total	\$274.54

The J. C. Penney Company at no time deducted any of the alleged taxes from the dividends paid to its stockholders.

The entire balance, amounting to \$21,854.43, of said corrected assessment of \$22,128.97 (without interest or penalties therefor) represents the tax on dividends received outside of Wisconsin by persons residing outside of the State of Wisconsin. Over ninety-six percent of the stockholders of the company owning ninety-eight percent of the stock reside outside of Wisconsin.

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Compliance with the statute would require J. C. Penney Company to perform numerous clerical operations in the State of New York each time a dividend is paid. While it is impossible to itemize the cost of such compliance, it is evident that it would require an extra or additional calculation or operation on the part of each employee participating in the determination of the amount of dividends payable to each stockholder of record and in the issuance of the checks therefor, since the calculation and deduction of the tax would necessarily increase the work to that extent.

The proofs before the Commission further show that the dividends in question were specified by the resolutions declaring the same to be paid from the surplus of the company, and that at the end of the calendar year 1934 the J. C. Penney Company had a surplus of \$29,279,543.14, at the end of 1935, a surplus of \$36,072,252.54, and at the end of 1936 a surplus of \$37,095,176.77, which represented accumulated earnings of many years derived from all of the states of the Union. The Wisconsin earnings, and earnings for particular calendar years, were not segregated and had lost their character as earnings long before the dividends herein involved were paid.

The proofs before the Commission further show that under Section 34 of the Delaware Corporation Law, under which J. C. Penney Company is incorporated, the Board of Directors have power to declare and pay dividends upon the shares of capital stock either (a) out of its

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net assets in excess of its capital, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year.

118 Under date of July 21st, 1938 the Wisconsin Tax Commission rendered its decision, a copy of which is attached hereto and marked Exhibit #1, wherein and whereby it ordered that the additional assessment was properly made and that the same be placed upon the tax roll after the same is recomputed at the straight $2\frac{1}{2}\%$ rate rather than at the rate originally used by the Commission of .025641, and it is from this decision that the J. C. Penney Company appeals.

ASSIGNMENTS OF ERROR

(1) The Wisconsin Tax Commission erred in deciding and ordering that the assessment and additional assessment in question was properly made, and in ordering that the additional assessment be placed on the tax roll;

(2) The Wisconsin Tax Commission erred in its findings and decision and order that the Wisconsin Privilege Dividend Tax law was constitutional as applied to any of the dividends paid by the J. C. Penney Company which are involved in this appeal;

(3) The Wisconsin Tax Commission erred in any event in determining that the Wisconsin Privilege Dividend Tax law was constitutional

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so far as it was applicable to payments of dividends to such of the stockholders as were non-residents of Wisconsin;

(4) The Wisconsin Tax Commission erred in refusing to pass upon the constitutionality of the Wisconsin Privilege Dividend Tax law as applied to the J. C. Penney Company.

PROPOSITIONS OF LAW RELIED UPON BY THE TAXPAYER IN THIS APPEAL

(a) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, and deprives J. C. Penney Company and/or its stockholders of property without due
119 process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin except the receipt of such dividends as were paid to Wisconsin stockholders. Furthermore, the funds from which said dividends were paid cannot be said to be Wisconsin funds but are general funds of the company deposited in New York banks and de-

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rived from remittances from stores in all of the forty-eight states and general deposits by the New York office of the company.

That the State of Wisconsin further has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the State of Delaware and/or the laws of the State of New York.

That even if said tax might be held to be constitutional from a jurisdictional standpoint, insofar as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the State and/or as to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Constitution of the State of Wisconsin, since it would be a denial of the equal protection of the laws to residents of Wisconsin and as to Wisconsin corporations it would not be uniform and would contain unreasonable exemptions.

That the tax is on the *payment and receipt* of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists the whole assessment is invalid.

That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session

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Laws of 1935, and amendments thereto, under which this tax is assessed, that the Legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the State. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the Legislature would not have passed it in so limited a form. Consequently, the entire law is ineffective notwithstanding the provisions of Section 4 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto.

That even if the tax might be held to be invalid insofar as it levies a tax on dividends paid to and received by Wisconsin residents within the State, it is invalid insofar as it purports to levy a tax on dividends paid and received outside of Wisconsin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin and consequently said State has no jurisdiction to levy an excise tax. That \$23,293.70 of said assessment represents taxes, penalties and interest levied upon the payment of such dividends. This proposition is presented as an alternative and is not to be construed as an admission that the law is valid insofar as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position here taken that the whole tax is invalid.

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(b) That said tax is further unconstitutional under Section I of the Fourteenth Amendment of the Constitution of the United States of America and Article I, Section I of the Constitution of the State of Wisconsin, because it is a direct tax upon the J. C. Penney Company stock. The State of Wisconsin has no jurisdiction to tax said stock insofar as it is owned by persons not residing within the State. \$23,293.70 of this assessment, including taxes, penalties and
121 interest, was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

(c) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Constitution of the State of Wisconsin, and deprives J. C. Penney Company of liberty and property without due process of law in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous other acts within the State of New York. The State of Wisconsin has no jurisdiction to require J. C. Penney Company to do such acts within the State of New York in order to assist it in collecting the tax levied by said section and amendments thereto.

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(d) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution, because when declared a dividend becomes a debt of the company. The tax is in effect a direct tax on such debt which has no taxable situs in the State of Wisconsin.

(e) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article I, Section 1 of the Wisconsin Constitution, because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. The annual earnings cannot be apportioned as to time and that therefore the tax is unconstitutional as to 1936 dividends as well as 1935, because it is retroactive and in effect a tax upon accumulated surplus which does not have a taxable situs in the State of Wisconsin.

422 (f) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States of America and Article VIII, Section 1 of the Wisconsin Constitu-

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tion because it is an excise on the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt. Said exemption is a denial of the equal protection of the laws and unreasonable. Said tax is also not uniform.

(g) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Article I, Section 10 of the Constitution of the United States of America and under Article I, Section 12 of the Wisconsin Constitution, because it impairs the obligation of contracts. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholder received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of Delaware, New York and Wisconsin.

(h) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Article IV, Section 1 of the Constitution of the United States of America, because it fails to give full faith and credit to the laws of New York and Delaware and the corporate charter, by-laws and resolutions of J. C. Penney Company drawn pursuant thereto which give it the right to conduct its business and declare and pay dividends in said States.

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(i) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, and amendments thereto, is unconstitutional under Article I, Section 8 of the Constitution of the United States of America because it interferes with the power of Congress to regulate commerce among the several States. Said law interferes with the
123 free transmission of corporate funds from State to State.

(j) The assessment is further void because the same was calculated pursuant to the statutory presumption under Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 and amendments thereto, that the dividends in question were paid from the previous year's income and contained an exact proportionate part of the Wisconsin earnings for such year. Such presumption contained in the law in question is plainly not in accord with the true facts, and has been rebutted by the proof as made, and if not so rebutted, the same is void as arbitrary and unreasonable and unconstitutional under the 14th Amendment of the Constitution of the United States of America and Article 1, Section 1 of the Wisconsin Constitution.

The appellant herein has availed itself of the remedies provided by the Statutes of the State

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of Wisconsin, and particularly Sections 71.12
and 71.14.

J. C. PENNEY COMPANY,
Appellant.

By **A. W. Hughes,**
Vice-President.

GWINN & PELL of
522 Fifth Avenue,
New York City,
and

ELA, CHRISTIANSON & ELA, of
1 West Main Street,
Madison, Wisconsin,
Its Attorneys.

W. H. Dannat Pell,
Emerson Ela,
G. Burgess Ela,
Of Counsel.

124 In the Matter of the Appeal of)
J. C. PENNEY COMPANY,) Exhibit No. 1
a Corporation)
from an Assessment of Privilege)
Dividend Taxes with respect to)
dividends paid on December 31,)
1935, March 31, 1936, June 30,)
1936, September 30, 1936, and)
December 15, 1936.)

DECISION.

The main issue involved in this appeal is the
constitutional validity of the privilege dividend

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tax imposed by Chapter 505, Laws of 1935, as amended, upon dividends declared by J. C. Penney Company, a Delaware corporation.

The Tax Commission has in the past refrained from ruling upon the constitutionality of any act of the legislature, and it so rules in this case.

The rate of the tax should be changed in this case from 2.5641% to 2.5%, as was conceded at the hearing on the part of the taxpayer and the income tax division of the Tax Commission.

FINDINGS.

According to an opinion rendered by the Attorney General, the Tax Commission is not supposed to pass upon the constitutionality of any act of the legislature, but if we were at liberty to pass upon the law we would have to find it constitutional and adhere to *State ex rel. Froedert Grain and Malting Company vs. Tax Commission*, 221 Wis. 225. The rate should be changed to 2.5%, and the tax should be recomputed.

DECISION.

IT IS, THEREFORE, ORDERED BY THE TAX COMMISSION That the assessment was properly made.

IT IS FURTHER ORDERED That the additional assessment, after being recomputed at 125 the 2.5% rate, be placed on the tax roll and that

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proper notice be given to the parties to this appeal of this decision.

Dated at the State Capitol, Madison, Wisconsin this 21st day of July, 1938.

WISCONSIN TAX COMMISSION,

W. J. Conway,

Henry A. Gunderson,

Herbert L. Mount,

Commissioners.

126 Cover.

127-128 ANSWER OF WISCONSIN TAX COMMISSION ON APPEAL TO CIRCUIT COURT.

(Title omitted.)

For answer to the objections raised by the Appellant in the above-entitled action, the Respondent Wisconsin Tax Commission, appearing by the Attorney General and Harold H. Persons, Assistant Attorney General, say that the assignments of error are without support in the law, or in the facts as shown by the record made up of copies of all the documents, papers, evidence statements and exhibits on file in the matter and all the testimony taken down, returned into court pursuant to sec. 71.16, Wisconsin Statutes.

ORLAND S. LOOMIS,

Attorney General,

HAROLD H. PERSONS,

Assistant Attorney General,

Attorneys for Respondent.

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ADMISSION OF SERVICE of Brief of Appellant on Appeal to Circuit Court.

(Omitted.)

1-109 **Record Before Wisconsin Tax Commission Returned to Circuit Court on Appeal.**

1-2 **RETURN** of Wisconsin Tax Commission on Appeal.

(Omitted.)

3-10 **INDEX TO RECORD** Before Wisconsin Tax Commission.

(Omitted.)

11-46 **TRANSCRIPT OF TESTIMONY BEFORE WISCONSIN TAX COMMISSION.**

11 "Papers marked by the reporter Exhibits 1, 2, 3 and 4, AJK.

"Mr. Best: If the Commission please, this is a hearing held pursuant to the application of J. C. Penney Company, a Delaware corporation, from an assessment of privilege dividend taxes with respect to dividends paid on December 31, 1935, on March 31, June 30, September 30, and December 15, 1936.

"The reporter has marked as Exhibit 1 the stipulation of facts entered into between the parties.

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"He has marked as Exhibit 2 the document consisting of several sheets, the first sheet being a copy of a letter dated March 2nd, 1937, from Wisconsin Tax Commission to J. C. Penney Company; the next sheet being a letter dated March 16th, 1937, from J. C. Penney Company to Mr. L. F. Dugan, auditor, Wisconsin Tax Commission, together with the next three sheets, being enclosures which accompanied that letter, the first one being headed 'Wisconsin separate accounting data of J. C. Penney Company'; the second sheet of the enclosure being headed, 'J. C. Penney Company, profit and loss account for the year ended December 31, 1935'; and the third sheet of the enclosure being headed 'J. C. Penney Company, a Delaware corporation, balance sheet as at December 31, 1934.'

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"The next sheet of the exhibit is a copy of a letter dated March 31, 1937, from the Wisconsin Tax Commission to J. C. Penney Company; the next sheet of the exhibit is a schedule which was attached to the letter dated March 31, 1937, showing the computation of privilege dividend taxes and the last sheet of the exhibit a copy of a letter dated July 16th, 1937 from Wisconsin Tax Commission to J. C. Penney Company, attached to which is a return receipt for registered mail.

"The reported has marked as Exhibit 3 two sheets, the first of which is the original of a telegram from Gwinn and Pell, to R. F. Kamm, auditor, Wisconsin Tax Commission, dated July 31 — presumed to be July 31, 1937; the second sheet of which is a copy of a telegram from Wisconsin Tax Commission to Gwinn and Pell, dated July 31, 1937.

"The reporter has marked as Exhibit 4 document consisting of two sheets, the first of which is a copy of a letter from Wisconsin Tax Commission to Gwinn and Pell dated September 4, 1937, acknowledging receipt of a protest and request for hearing in this matter; the second sheet of which is a copy of a letter from Wisconsin Tax Commission to J. C. Penney Company, dated March 31, 1938, notifying the taxpayer of the date of this hearing.

"We offer Exhibits 1, 2, 3 and 4 in evidence. Is there any objection?

(Objection reserved but later withdrawn.)

"Mr. Best: The privilege dividend tax involved in this matter was originally computed in the letter dated March 31, 1937, at the rate of 2.5641 per cent and in accordance with the Commission's recent ruling in this matter, the Income Tax Division now concedes that the tax rate to be applied to the dividends should be 2.5 per cent.

"Mr. Ela: Just a minute, that is the revised computation on that basis.

"Mr. Best: We have made no revised computation but in the event the Commission affirms the assessment, we concede it should be computed at 2.5 per cent.

"Mr. Ela: Wouldn't it be well to agree that the actual computation on that basis shall be incorporated as part of this record? I think it might be desirable.

"Mr. Best: Well, I see no need.

"Mr. Ela: That is surely a matter—

"Commissioner Conway: If there is any question about it, you are entitled to that.

"Mr. Pell: If I may supplement Mr. Ela's statement, the only reason for having it in, if we go up to the court, it would be well for the court to have before it the exact amount involved.

"Mr. Best: That would be done in this manner: If the Commission affirms the assessment and directs the tax to be computed at 2.5 per cent, it will direct that assessment as computed be entered on the tax roll or if there already is one, that it conform to that. It will form a part of the record together with that decision.

"Mr. Pell: That will be satisfactory, as long as we follow the record; that would be the only point.

"Commissioner Conway: That will be the understanding.

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"Mr. Best: The exhibits which we have offered show the basis of the computation of this tax and the parties have stipulated as to certain facts. The only issue involved is the constitutional validity of the tax in question.

"That is all that we have at this time.

"Mr. Ela: We will call Mr. Raskopf."

A. J. RASKOPF, witness, called on behalf of appellant:

Direct Examination.

15 My name is A. J. Raskopf and I reside in Garden City, Nassau County, New York. I am Secretary of the J. C. Penney Company and have been continuously since December 29, 1931. As such officer I have charge of the minute book of the corporation. I also have charge of the stock book of the corporation and of the records having to do with the declaration and payment of dividends. As Secretary I attend all of the meetings of the directors except when I am on vacation. I take and keep the minutes of the meetings of the stockholders and of the directors which I attend. I have charge of the tax department of the J. C. Penney Company and I am familiar with the general methods employed in conducting the business of this corporation. The company was incorporated under the laws of Delaware on
16 December 15, 1924. The company has a statutory office at 100 West 10th Street, Wilmington, Delaware, as required by the laws of the state. We

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- actually maintain our name on an office there and maintain some one there who is the agent for the company at that address. The principal office for the transaction of business is located at 330 West 34th Street, New York City, and was located there during the years 1934, 1935 and 1936. J. C. Penney Company is qualified to do business as a foreign corporation both in the state of New York and state of Wisconsin. During the years 1935 and 1936 J. C. Penney Company was required to pay a franchise tax as a domestic corporation in the state of Delaware and did make payment of that tax. During that same period J. C. Penney Company as a foreign corporation paid franchise taxes to the state of New York. We paid income taxes in the state of Wisconsin for the years 1934, 1935 and 1936 and filed returns upon the forms required by the tax authorities of Wisconsin. So far as I know those tax returns disclose the true facts pertaining to the income of this corporation, and contained a full and complete disclosure as required by the laws of Wisconsin. We also made a report of the payment of dividends involved in this tax matter to the state of Wisconsin, but took the position that we were not liable for the tax and have never paid it. In those reports however we disclosed the true facts regarding the dividends.

In 1934, 1935 and 1936 and presently the J. C. Penney Company was and is engaged in the business of operating retail department stores in all of the forty-eight states of the Union. We have

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about fifteen hundred stores and the number changes slightly from time to time. We are able to give figures as of certain definite dates with respect to the number of stores. I have a table of the number of stores operated by our company in each of the forty-eight states as of the end of the years 1934, 1935 and 1936.


19 (Exhibit 5 marked.) Exhibit 5 is a document reflecting the number of stockholders according to states as of December 20, 1935, March 20, 1936, June 20, 1936, September 18, 1936 and December 4, 1936, and is a true and correct statement of the facts therein reflected. (Exhibit 5 offered in evidence.) The dates reflected in Exhibit 5 are dates of record for the payment of the dividends in question. Exhibit 5 is a complete tabulation showing the number of stockholders in each state as of the date of record for payment of the dividends.

20 (Exhibit 6 marked.) Exhibit 6 has been compiled under my instructions and accurately sets forth the facts regarding the number of stores operated in the various states as of the end of 1934, 1935 and 1936. (Exhibit 6 offered in evidence.) At the end of 1934 we had 1474 stores, of which 47 stores were in Wisconsin; at the end of 1935 we had a total of 1481 stores, of which 48 were in Wisconsin; at the end of 1936 we had a total of 1496 stores, of which 48 were in Wisconsin. (Exhibit 7 marked.)

21 Exhibit 7 is an accurate list of locations of our stores in Wisconsin as of the end of 1936.

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In the operation of the J. C. Penney Company we have a uniform system or method of handling moneys received by the different stores. Every store in Wisconsin, and the same is true of every store in every other state, has an account with a local bank in the town in which the store is located. All the money received from the sale of goods is deposited by the local manager of the store in this bank. From this bank account payments are made by the store manager for local pay rolls, rents, advertising and other local expenses only. The balance of the money is transmitted by the store manager to a regional bank maintained by the company in a large city near the store. These regional banks are purely conduits for the transmission of these funds to the treasurer's office in New York City, where the money is deposited to the general credit of the J. C. Penney Company in New York banks. The 22 moneys after leaving the local banks completely lose their identity as moneys derived from any particular source. In 1934 and 1935 stores in Wisconsin transmitted their funds to the regional bank at Chicago, Illinois, and in 1936 to the regional bank at Milwaukee, Wisconsin, from which banks the funds were transmitted to New York. The moneys so deposited to the credit of the company in the New York banks are used to pay salaries, general overhead expenses of New York and other offices, taxes and dividends, and checks are likewise drawn on these New York City bank accounts in payment of merchandise purchased from all sources and shipped to all



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stores of the company including those of Wisconsin. The local store manager has nothing whatsoever to do with the money that is realized from sale of merchandise in a local store except to pay the purely local expense items and to transmit the money to the regional bank. After it gets to the regional bank there is nobody in Wisconsin that has any thing whatsoever to do with it. In getting the money out of the Milwaukee bank checks or drafts are drawn in New York for the transfer of the funds from the Milwaukee bank to whatever bank we desire that it go to, and no one in Wisconsin has any thing to do with that.

The stock books, minute books and secretary's records of the company are kept within the State of New York except as required by the Delaware statutes. A duplicate stock ledger is maintained at the office of the Corporation Trust Company, J. C. Penney Company's statutory agent in Delaware. All transfers of shares of stock in the company are made in New York by the Chemical Bank & Trust Company, 165 Broadway, New York City, which company is the transfer agent of the J. C. Penney Company capital stock. All stockholders' meetings of the company are held in the state of New York. There has never been held any stockholders' meetings in the state of Wisconsin. All directors' meetings are held in the state of New York. There have never been, within my knowledge, any directors' meetings held within the state of Wisconsin. The divi-

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- 24 dends which were declared during the years 1935 and 1936 were by resolution of the board of directors. Each one was represented by a specific resolution fixing the rate of the dividend and the date of closing the books for dividend purposes. All dividends during the years 1935 and 1936 were declared at meetings of board of directors of the company held at 330 West 34th Street, New York City, and as stated, all the records in connection with the declaration of payments were physically located in New York City. On December 21, 1935 the dividend declared was at a rate of \$2.25 a share and the total paid to shareholders was \$5,555,214.00; on March 31, 1936 and June 30, 1936 the rate was 75c a share and on each of those dates \$1,851,738.00 is the total amount paid to shareholders; on September 30, 1936 the amount of dividends per share was \$1.00 and the total amount paid to shareholders was \$2,468,984.00 and on December 15, 1936 the dividend rate per share was \$4.75 and the total amount
- 25 paid to shareholders was \$11,727,674.00. On those same dates the rate paid on shares owned by residents of the state of Wisconsin would be the same as I have heretofore testified. The number of shares owned by Wisconsin residents on the five record dates for dividends which I have enumerated are as follows: December 31, 1935, 32918; March 31, 1936, 33086; June 30, 1936, 33760; September 30, 1936, 34097; December 15, 1936, 28031.

On December 31, 1935 there were outstanding a total number of shares of 2,468,984 and the percentage of shares held by Wisconsin residents on that date was 1.33%. On March 31, 1936 the total number of shares outstanding was 2,468,984 and the percentage of shares held by Wisconsin residents was 1.34%. On June 30, 1936 the total number of shares outstanding was 2,468,984 and the percentage of shares held by Wisconsin residents was 1.36%. On September 30, 1936 there was a total of 2,468,984 shares outstanding and the percentage of shares held by Wisconsin residents was 1.38%. On December 15, 1936 the
26 total number of shares outstanding was 2,468,984 and the percentage of shares held by Wisconsin residents was 1.13%.

The actual payment of these dividends was effected by the executive officers of the company at New York City, who caused checks to be drawn on the accounts of the company in its New York banks payable to the stockholders of record upon each dividend record date. Such checks were placed in envelopes addressed to each stockholder at his address as the same appeared from the records of the company. Upon the date of payment of such dividends such checks were mailed from the postoffice in New York City. No act in connection with the declaration of the payment of such dividends was performed inside the state of Wisconsin. No act in connection with the receipt of such dividends was performed within the state of Wisconsin except the receipt by the

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small percentage of stockholders that I have testified to who resided within the State of Wisconsin and who received their checks at their residences by mail from New York City.

- 27 Over 96% of the stockholders reside outside of Wisconsin. Some of the figures which I have given differ slightly from the figures shown in Exhibit B which was attached to our application for hearing and that is accounted for by the fact that certain slight errors were discovered on a recheck and they are corrected by my statement here as of today.

- I also have a table showing the total amounts received by Wisconsin residents on payment of the dividends on the dates that I have testified to. The total amount of dividends received by Wisconsin residents on the payment of the December 31, 1935 dividend was \$74,065.50; on the March 31, 1936 dividend \$24,814.50; on the June 30, 1936 dividend \$25,320.00; on the September 30, 1936 dividend \$34,097.00, and on the December 15, 1936 dividend \$133,147.25.

- 29 I have also computed the portion of the amounts of these dividends received by Wisconsin residents allocable to Wisconsin earnings, on the basis of the Wisconsin Tax Commission's computation, using the percentages that the Tax Commission used in reaching the assessment, and those amounts are as follows: \$2,599.40 of the December 31, 1935 dividend; \$956.80 of the March 31, 1936 dividend; \$976.29 of the June 30, 1936 divi-
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dend; \$1,314.71 of the September 30, 1936 dividend; and \$5,133.89 of the December 15, 1936 dividend. I have also made a computation of the amount of tax if it were limited to the last given figures. However, I have used the percentages of 2.5641% that is now conceded to be excessive and the figures that I have would be slightly less if computed on the 2.5% basis. On the basis of the 2.5641% figure, the total tax on the dividends received by Wisconsin stockholders would be \$281.56.

31 The J. C. Penney Company has no executive office of any kind located within the state of Wisconsin. Its sole business in the state of Wisconsin consists of the operation of stores as shown on the list which I have heretofore certified. Each local store is managed by a local store manager who performs no executive function in connection with the general function of the business. He does buying for his store but does not pay for the merchandise. I have made an excerpt from the certificate of incorporation of J. C. Penney Company regarding the rights of stockholders, from the articles of incorporation of J. C. Penney Company. Article 9 of the certificate of incorporation of J. C. Penney Company as it existed on December 1, 1935, provided in part as follows:

"The holders of the common stock of this corporation shall be entitled (subject to the rights of holders of preferred stock) to receive all dividends, whether stock or

cash, declared and distributed out of the surplus or net profits earned by the corporation."

32 During 1935 the preferred stock of the company was called for retirement so that actually at the end of 1935 no preferred stock was in existence, and the articles of incorporation were amended by striking out the words "subject to the rights of the holders of preferred stock". At present the common stockholders are the only persons entitled to participate in dividends. At the end of the calendar year 1934 J. C. Penney Company had a surplus over and above its liabilities and capital stock account of \$29,279,543.14; at the end of the calendar year 1935 it had a surplus of \$36,072,252.54; at the end of the year 1936 it had a surplus of \$37,095,176.77.

We have a standard form of resolution that we use in declaring dividends. The form of each of these dividend resolutions is as follows:

"Resolved, that the board of directors of J. C. Penney Company does hereby declare from the surplus of the company a dividend for the quarter ending blank date of blank amount per share on the common stock of the company outstanding at the close of business on the blank day of blank month."

33 (Discussion between Counsel and Commission re Articles of Incorporation.)

"Mr. Ela: Now, Mr. Best, we do want to include in our proofs here a part of the Delaware corporation law pertaining to declaring and paying of dividends. Mr. Pell is more familiar with that. He has brought with him a copy of the Delaware corporation law, annotated, 1937, as issued by the Corporation Trust Company of New York, but if you wish, we can of course, bring down the librarian with the copy of the statutes. I trust you will be willing to accept this.

"Mr. Best: I have no objection to the form of the offer. May I ask the purpose of it, however.

"Mr. Ela: Just to complete this record on questions that may arise. We are here obviously building a record for the questions that may develop. They are the background of the whole issue of constitutionality and it is just one more element that may be involved.

"Mr. Best: I note that the section which you propose to have incorporated in the record relates to the priority of surplus and net profits as a source for the payment of dividends.

(Discussion off the record.)

"Mr. Pell: We are not accepting the theory of the law that these dividends were paid out of these particular profits, Mr. Best. I mean, if the law is valid we accept

35

your computation, because that is what the law says to do. But on the other hand, we don't accept the conclusion that these dividends were actually paid out of these particular earnings.

"Mr. Best: You propose to show another source for those dividends?

"Mr. Pell: We have only put in evidence the fact that the Penney Company resolutions state they are paid out of the surplus of the company. We have already put in evidence the surplus figures of the company as of the years 1934, 1935 and 1936.

"Mr. Best: Do you propose to show what percentage of that surplus resulted from Wisconsin income?

"Mr. Pell: No, we don't; but what we propose to argue before the Court is the surplus completely loses its identity and nobody on earth could tell what proportion of these dividends were paid out of Wisconsin earnings. It is a matter of argument and for that reason we want to put in this provision which permits the payment of dividends out of surplus or what you call assets in excess of capital.

"Mr. Best: I have no objection to the introduction of the provision from the Delaware corporation law. May I suggest that in order to avoid putting lengthy volumes in evidence here, that the particular section be copied by the reporter from the volumes

which you have before you, subject to verification and comparison with the Delaware statutes.

"Mr. Pell: This is issued under the official certificate of the Secretary of State by the Corporation Trust Company, who you know very well probably, if you use them as much as we do.

36

"Mr. Ela: Do you want to follow that, perhaps, for the purpose of the record? We are now offering a part of Section 34, dividends, reserves. 'The directors of every corporation created under this chapter subject to any restrictions contained in its certificate of incorporation shall have power to declare and pay dividends upon the shares of its capital stock, either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year.' "

(Exhibit 8—application for hearing and objection to assessment—offered in evidence.)

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Exhibits 5, 6, 7 and 8 received in evidence. The reservation of right to object to Exhibits 1-4, on behalf of the taxpayer, was withdrawn (see R. 47).

Cross Examination.

- 38 Each of the stores in Wisconsin had a bank account out of which the local pay roll and rents and local advertising expenditures are paid. I can't state the approximate total of balances in the Wisconsin accounts during the years in question but each store might keep a few thousand dollars. That would, of course, depend on the size of the business and on the time of the year which would be controlled by the amount of business. The transfers from the local accounts to the regional accounts are made by the local
- 39 managers under instructions of the treasurer of the company. They have a blanket instruction that when the accounts get to a point where it is not needed locally then it shall go into the regional bank. In 1936 there was a regional bank account in Milwaukee and there was at least some attempt to maintain the balance at a certain figure in that account. I have no knowledge of what the minimum requirements might be at that bank but it probably would be around \$50,000.00 I don't happen to know the balance required by the regional banks. The regional bank accounts are drawn upon by the treasurer's office in New York. The money is transferred to the New York bank accounts out of which general salaries, overhead, taxes and merchandise purchases are paid.
- 40 All taxes except the taxes paid locally by the stores are paid out of New York. Local property

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taxes are paid by the stores out of their own bank accounts. Wisconsin income taxes, for example, are paid out of New York bank accounts. J. C. Penney Company is licensed to do business in Wisconsin and has filed Wisconsin income tax returns and paid Wisconsin income taxes for the years 1934, 1935 and 1936. The Wisconsin income which was reported for taxation on those returns was on a separate accounting basis. I can't say without referring to the return whether in making the separate accounting Wisconsin income taxes were deducted. If it is deductible by the

41 state then it probably was taken. Deductions were taken in computing the Wisconsin taxable income for the cost of merchandise sold by the Wisconsin stores. Deductions were taken for a proportion of the general salaries and overhead of the New York organization which was prorated through all the stores, and a portion was taken as a deduction in Wisconsin. The J. C. Penney Company does not have regional offices. It has what we call a very limited number of district offices, but they merely have a district manager who is more or less a supervising manager for a given number of stores. We do not have any district office in Wisconsin nor did we have any such in the years 1934, 1935 and 1936. There is a district manager who exercises supervision over the store manager. The district manager

42 has no organization under him nor office staff. He may have an office stenographer. I think that Minneapolis was the district office which had the supervision over Wisconsin stores in 1934, 1935 and 1936, although I do not know

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43 that definitely. The surplus account of the J. C. Penney Company about which I testified is built up from the profits of the various stores throughout the chain and is built up over a period of years. This began back of 1924. J. C. Penney Company was previously incorporated under the laws of the state of Utah in 1916. The present taxpayer, J. C. Penney Company, was organized December 15, 1924 and that corporation acquired the assets and assumed the liabilities of the Utah corporation of the same name. That Utah corporation operated stores in the state of Wisconsin. I would say that the income from the Wisconsin stores which had been operated by both the Utah corporation and the Delaware corporation, which were taken into surplus account of the corporation which operated the stores, in part accounts for the surplus balance which I have read into the record. I don't know what part of it would have been applicable to the operation of stores in former years when we were a Utah corporation and when we had a separate classification of stock for every store. At that time any surplus belonged to that particular store. There was a segregation on our books and that was wiped out in 1924 when we became a Delaware corporation. In 1924 when we became a Delaware corporation any surplus which stood on the books to the credit of the Wisconsin stores was transferred from the Utah company to the other company and that transfer of the surplus from the Utah company to the Delaware corporation included the transfer of the surplus which previously had been segregated as being applicable to the Wisconsin stores.

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44 I don't know what proportion of that surplus was attributable to the income of these Wisconsin stores and have never made any calculations on the same. I am certain that would be a rather Herculean task to attempt. I could not say whether the percentage was more or less than the percentages of the dividend which was computed by the Tax Commission as being payable out of Wisconsin income. The Tax Commission has used a certain basis of factors for arriving at those percentages and I don't know whether those percentages would be the same throughout the chain. They would vary from state to state; therefore they would be entirely different. I can't say whether the proportion of the surplus which resulted from the income from these Wisconsin stores was more or less than 3% or more or less than 4%.

46 *COPY OF LETTER* by Attorneys for Appellant to Wisconsin Tax Commission, Withdrawing Objections to Exhibits 1 to 4.

(Omitted.)

47-51 *ORIGINAL* of Above Letter.

(Omitted.)

52-54 *DECISION* of Wisconsin Tax Commission (the decision of the Wisconsin Tax Commission is attached as an exhibit to the notice of appeal. R. 124, 125, C. 19-21, and is consequently omitted at this portion of the case.)

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55-58 *LETTER* of Wisconsin Tax Commission and Return Receipt to Appellant, Enclosing Decision of Wisconsin Tax Commission.

(Omitted.)

59-64 *EXHIBIT 1*, Partial Stipulation of Facts on Application for Hearing on Objections to Assessment:

(Title omitted.)

59. *WHEREAS*, the above entitled matter is pending before the Wisconsin Tax Commission upon the application of J. C. Penney Company for hearing on objections to assessment dated July 16, 1937, and whereas it appears that certain of the facts in connection with the matter as set forth in the application for hearing and objections are not in dispute and that certain facts can be stipulated, which will result in simplifying the proofs to be offered in the above captioned matter;

NOW, THEREFORE, it is hereby stipulated by and between Wisconsin Tax Commission and the J. C. Penney Company, by their respective attorneys, as follows:

1. That on July 17, 1937 the said J. C. Penney Company received notice of additional assessment of privilege dividend tax in the principal amount of Twenty-two Thousand Six Hundred Ninety-six and 37/100 (\$22,696.37) Dollars, together with interest and penalties which notice was dated July

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16, 1937, and was from the Wisconsin Tax Commission. That the said assessment by the Wisconsin Tax Commission is identified in a letter to the J. C. Penney Company from the Wisconsin Tax Commission dated March 31, 1937, and
60. that a copy of the identifying statement of said assessment as included in said letter is attached hereto, marked Exhibit "A."

2. That the time for filing objections to the assessment and application for hearing was duly extended by the Wisconsin Tax Commission to August 26, 1937, and that the application herein was filed on or before that time.

3. That the J. C. Penney Company is a corporation organized and existing under the laws of the State of Delaware, and pays franchise tax to it. That the said J. C. Penney Company is also licensed to do business in the State of Wisconsin as a foreign corporation. That the J. C. Penney Company paid an income tax to the State of Wisconsin for the years 1934, 1935 and 1936.

4. That the J. C. Penney Company is and during the years 1934, 1935, 1936 and 1937 was engaged in the business of operating a nationwide chain of retail department stores.

5. That the said J. C. Penney Company has a statutory office in Wilmington, Delaware, as required by the laws of Delaware. That its principal office for the transaction of business is at

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330 West 34th Street, New York City. That all of the stock books, minute books, and secretary's records of the J. C. Penney Company are kept within the State of New York. That all transfers of stock of the company are made in New York by the Chemical Bank & Trust Company as transfer agent. That all directors, stockholders and other official meetings of J. C. Penney Company are held in the State of New York. That at directors' meetings held in the principal offices of the company at 330 West 34th Street, New York City, the following dividends were declared payable:

Date Paid	Total Amount Paid to Stockholders	Amount per Share
12/31/35	\$ 5,555,214.00	\$2.25
3/31/35	1,851,738.00	.75
6/30/36	1,851,738.00	.75
9/30/36	2,468,984.00	1.00
12/15/36	11,727,674.00	4.75

- 61 6. That the actual payment of said dividends was effected by the executive officers of the company who caused checks to be drawn upon the accounts of the company in its New York banks payable to the stockholders of record upon each dividend record date. That such checks were placed in envelopes addressed to each stockholder at his address as the same appeared from the records of the company upon the date of payment of such dividend.

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IT IS EXPRESSLY STIPULATED AND AGREED that the facts herein set forth shall be accepted as proven, and that additional and supplementary proofs may be made at the time set for hearing on the application for hearing on objections to assessments.

Dated this 6 day of April, A. D., 1938.

WISCONSIN TAX COMMISSION

By John S. Best,
Its Attorney.

J. C. PENNEY COMPANY

By Ela, Christianson & Ela,
Its Attorneys.

62 **Exhibit A—Folded Insert.**

65-74 **EXHIBIT 2, Various Letters Re Information Requested by Wisconsin Tax Commission.**

65 **REQUEST FOR INFORMATION** by Wisconsin Tax Commission to Appellant, Dated March 2, 1937.

(Omitted.)

66-69 **LETTER FROM APPELLANT, Dated March 16, 1937, to Wisconsin Tax Commission, in Response to Request for Information, Together with Enclosures.**

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EXHIBIT "A"

J. C. PENNEY COMPANY

<i>Date of Payment</i>	<i>12-31-35</i>	<i>3-31-36</i>	<i>6-30-36</i>	<i>9-30-36</i>	<i>12-15-36</i>	<i>Total Additional</i>
Amount of Dividend	\$ 5,555,214.00	\$ 1,851,738.00	\$ 1,851,738.00	\$ 2,468,984.00	\$ 11,727,674.00	
Percent paid from Wisconsin Income	3.5096	3.8558	3.8558	3.8558	3.8558	
Taxable Dividend	\$ 194,965.79	\$ 71,399.31	\$ 71,399.31	\$ 95,199.09	\$ 452,195.65	
Rate of Tax	.025641	.025641	.025641	.025641	.025641	
Privilege Dividend Tax	\$ 4,999.12	\$ 1,850.75	\$ 1,830.75	\$ 2,441.00	\$ 11,594.75	\$ 22,696.37
Penalty & Int. to 4/30/37	474.92	146.46	119.00	122.05	405.81	1,268.24
Total Additional	\$ 5,474.04	\$ 1,977.21	\$ 1,949.75	\$ 2,563.05	\$ 12,000.56	\$ 23,964.61

	<i>1934</i>		<i>1935</i>
Wisconsin Taxable Income	562,331.00	— 3.5096%	587,001.00 — 3.8558%
Total Income	16,022,607.00		15,223,478.00
	<i>1934</i>		<i>1935</i>
Book Income	\$16,024,334.14		\$15,252,675.67
Increase-Reserve for U. S. taxes	61,418.55		127,654.20
Increase-Reserve for Fire Losses	116,362.57		87,488.97
Taxes adjusted through Surplus	56,670.75		30,964.69
Total Income computed on a Wisconsin tax basis	\$16,022,607.41		\$15,223,478.13

Note: Italicized figures indicate red.

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REGISTERED RETURN RECEIPT Showing Receipt by Appellant of Letter Dated March 31, 1937.

(Omitted.)

71

LETTER Dated March 31, 1937, from Wisconsin Tax Commission to Appellant, Enclosing Computation of Alleged Tax on Dividends from December 31, 1935 to December 15, 1936:

March 31, 1937

J. C. Penney Company
330 W. 34th Street
New York City

In re: 99-10821

Gentlemen:

We are enclosing a schedule which shows our computation of privilege dividend tax due upon dividends declared and paid by your company between September 26, 1935 and December 31, 1936. This schedule also shows our computation of the amount of each dividend which was paid from income earned within the State of Wisconsin.

The Wisconsin privilege dividend tax Statute provides that the tax shall be computed at the rate of 2.5%. It further provides that the amount of such tax shall be deducted from the dividend paid. In case that the tax is not so deducted, the amount of tax, in itself, constitutes a further dividend which is also subject to tax. In the latter case,

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the tax computed is at the rate of 2.5641% rather than 2.5%.

Interest on the additional taxes shown on this schedule has been computed to April 30, 1937, and payment should be made before that time in order to prevent the accumulation of further interest. You will receive no further statement from us for these taxes before April 30.

For your information, we are enclosing herewith, two of our forms 4D that may be used in reporting future dividends payments. You will find the Wisconsin privilege dividend tax Statute printed upon the reverse side of these forms.

Very truly yours,

WISCONSIN TAX COMMISSION
Income Tax Division

By: L. F. DUGAN
Auditor

LFD:mb

72 **SCHEDULE SHOWING COMPUTATION**
by Wisconsin Tax Commission of Additional Tax,
Enclosed in Letter to Appellant from Tax Commission dated March 31, 1937 (an exact copy of this schedule is attached as Exhibit "A" to Exhibit 1 at R. 62, Folded Insert at C. 46, and is consequently omitted at this portion of the case).

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73-74

LETTER of July 16, 1937, from Wisconsin Tax Commission to Appellant, Assessing Additional Privilege Dividend Tax, and Return Receipt:

(Return Receipt omitted.)

July 16, 1937

J. C. Penney Company,
330 West 34th Street,
New York, N. Y.

In Re: 99-10821

Gentlemen:

Chapter 233, Laws of 1937, effective June 15, 1937, adds a new subsection to the privilege dividend tax law, making applicable to that tax the provisions of the normal income tax law with regard to additional assessments, review of assessments, refunds, credits and collections.

Pursuant to the privilege dividend tax law as thus amended, you are hereby notified of an additional assessment of privilege dividend tax in the principal amount of \$22,696.37. The computation of this tax was explained in our letter of March 31, 1937, which also showed the amount of penalty and interest to April 30, 1937. In addition to the amounts set forth in that letter the principal amount of the tax is subject to interest at the rate of one-half of one per cent per month from April 30, 1937, until paid.

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If you desire a hearing in this matter, it will be necessary for you to apply therefor in writing stating definitely and in detail your objections to the assessment. Such application must be filed in duplicate within twenty days from the receipt of this notice.

If a hearing is applied for, you may, under Section 71.10 (6) (a) of the Statutes, elect to deposit with the State Treasurer the total amount of the additional taxes set forth above together with interest thereon to the first day of the month succeeding the application for hearing. Your election to so deposit these taxes must be expressed in your application for hearing.

If no request for hearing is made within the time specified above, this assessment will become final and conclusive.

Yours very truly,

WISCONSIN TAX COMMISSION
Income Tax Division

By:
R. F. Kamm, Auditor

RFK:W

Registered Mail
Return Receipt Requested

75-77 *EXHIBIT 3*, Telegrams Re Extension of Time
for Filing Application for Hearing on Additional
Assessment.

(Omitted.)

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EXHIBIT 5

NUMBER OF STOCKHOLDERS OF J. C. PENNEY

COMPANY ACCORDING TO STATES

State	As at 12-20-35	As at 3-20-36	As at 6-20-36	As at 9-18-36	As at 12-4-36
Alabama	38	38	38	39	40
Arizona	87	85	87	88	84
Arkansas	28	28	28	29	28
California	994	965	963	994	957
Colorado	168	188	191	193	212
Connecticut	183	195	199	201	210
Delaware	25	27	27	27	28
Florida	67	77	79	80	89
Georgia	81	88	89	90	97
Idaho	109	105	107	108	104
Illinois	595	625	637	644	672
Indiana	211	213	217	220	222
Iowa	228	226	230	253	228
Kansas	187	180	182	184	175
Kentucky	78	89	90	91	102
Louisiana	33	36	38	37	39
Maine	50	27	27	27	25
Maryland	96	98	98	99	98
Massachusetts	1153	1208	1231	1244	1292
Michigan	588	363	390	395	389
Minnesota	273	279	284	287	292
Mississippi	45	48	44	44	44
Missouri	505	545	555	561	595
Montana	117	115	118	119	117
Nebraska	145	145	147	149	146
Nevada	31	32	32	33	35
New Hampshire	56	65	66	67	76
New Jersey	317	334	345	346	365
New Mexico	31	33	34	34	34
New York	2696	2771	2827	2655	2911
North Carolina	107	105	107	108	104
North Dakota	122	118	116	110	112
Ohio	410	419	427	431	438
Oklahoma	110	113	115	116	117
Oregon	337	334	340	344	337
Pennsylvania	657	695	708	715	749
Rhode Island	89	95	97	98	103
South Carolina	33	33	34	34	34
South Dakota	100	96	98	99	93
Tennessee	58	58	57	57	54
Texas	208	206	209	212	208
Utah	177	188	192	193	202
Vermont	19	20	21	21	22
Virginia	58	62	63	64	68
Washington	265	266	271	275	272
West Virginia	46	44	45	46	44
Wisconsin	391	393	397	403	406
Wyoming	31	29	30	30	29
District of Columbia	110	114	116	118	119
Others-Foreign	62	63	65	65	68
TOTALS	12385	12687	12927	13066	15281

85 **EXHIBIT 6**, Number of Stores of Appellant Operated in Various States at End of Years 1934, 1935 and 1936.

EXHIBIT 6

Number of Stores Operated in Various States as at End of

State	1936	1935	1934
Alabama	9	8	8
Arizona	18	16	18
Arkansas	14	14	15
California	123	122	122
Colorado	51	50	50
Connecticut	6	5	5
Delaware	1	1	1
Florida	11	11	11
Georgia	17	17	16
Idaho	29	29	29
Illinois	42	42	40
Indiana	51	51	51
Iowa	67	67	67
Kansas	79	79	79
Kentucky	21	21	21
Louisiana	8	8	8
Maine	7	7	7
Maryland	5	4	4
Massachusetts	10	9	9
Michigan	46	46	46
Minnesota	60	59	59
Mississippi	15	14	14
Missouri	45	45	44
Montana	38	38	38
Nebraska	54	54	54
Nevada	9	10	10
New Hampshire	2	2	2
New Jersey	5	5	5
New Mexico	16	16	16
New York	28	28	28
North Carolina	26	26	26
North Dakota	44	34	34
Ohio	56	54	53
Oklahoma	49	49	49
Oregon	39	39	39
Pennsylvania	52	52	52
Rhode Island	1	1	1
South Carolina	12	12	12
South Dakota	28	28	29
Tennessee	20	20	19
Texas	104	98	98
Utah	29	29	29
Vermont	4	4	4
Virginia	12	12	11
Washington	64	64	64
West Virginia	10	10	9
Wisconsin	48	48	47
Wyoming	21	21	21
TOTALS	1496	1481	1474

86-87 **EXHIBIT 7**, Location of Stores of Appellant
Operated Within Wisconsin.

87

EXHIBIT 7

Locations of Stores Operated within
Wisconsin

Store No.	Location
264	Antigo
342	Appleton
606	Ashland
885	Baraboo
293	Beaver Dam
654	Beloit
453	Berlin
753	Boscobel
140	Chippewa Falls
1221	Clintonville
1291	Columbus
1018	Eau Claire
225	Fond du Lac
1466	Fort Atkinson
658	Green Bay
930	Hartford
324	Janesville
1446	Kenosha
1450	La Crosse
1311	Ladysmith
401	Manitowoc
1251	Marinette
261	Marshfield
1103	Milwaukee
1253	Milwaukee
1418	Milwaukee
726	Monroe
1320	New Richmond
289	Oshkosh
1051	Plymouth
423	Portage
674	Racine
765	Reedsburg
761	Rhineland
130	Rice Lake
436	Richland Center
1328	River Falls
1268	Shawano
494	Sheboygan
884	Sparta
1446	Spooner
498	Stevens Point
98	Watertown
1063	Waupun
92	Wausau
1025	West Allis
1060	West Bend
292	Wisconsin Rapids

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78-82 **EXHIBIT 4**, Letter Acknowledging Receipt of Notice of Appeal and Letter from Wisconsin Tax Commission Fixing Date for Hearing, and Return Receipt.

(Omitted.)

83-84 **Exhibit 5—Folded Insert.**

85 **Exhibit 6—Folded Insert.**

86-87 **Exhibit 7—Folded Insert.**

88-103 **EXHIBIT 8**, Letter Enclosing Application for Hearing and Objections to Assessment, to Wisconsin Tax Commission.

(Letter Omitted.)

90 **APPLICATION FOR HEARING** and Objections to Assessment Dated July 16, 1937:

(Caption and verification omitted.)

J. C. PENNEY COMPANY in making this application for hearing and objection to assessment sets forth the following:

(1) That on July 17, 1937 it received a notice of additional assessment of privilege dividend tax

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in the principal amount of \$2,696.37, together with interest and penalties of \$1,495.20, making a total of \$24,191.57, dated July 16, 1937, pursuant to Chapter 233 of the Wisconsin Laws of 1937. That said assessment is itemized in a letter to J. C. Penney Company from the Wisconsin Tax Commission dated March 31, 1937 which is referred to in said notice of additional assessment dated July 16, 1937. That a copy of the itemized statement of said assessment as included in said letter is annexed hereto as Exhibit "A." That apparently the difference between the total amounts due as noted in said itemized statement as \$23,964.61 and \$24,191.57 as noted in said notice of additional assessment is due to the fact that interest has been added for the months of May and June at the rate of $\frac{1}{2}$ of 1% per month on \$22,696.37, amounting to \$226.96.

91 That the twenty day period for filing objections to the assessment and application for a hearing was duly extended to August 26, 1937 by the Wisconsin Tax Commission.

That J. C. Penney Company is a corporation existing under the laws of the State of Delaware and pays a franchise tax to it. It is also licensed to do business in the State of Wisconsin. That J. C. Penney Company paid an income tax to the State of Wisconsin for the years 1934, 1935 and 1936. That J. C. Penney Company paid a franchise tax to the State of New York for the privilege of doing business there for the same years.

That J. C. Penney Company is and during 1934, 1935, 1936, and 1937, was engaged in the

business of operating a nation-wide chain of retail department stores. That the number of such stores fluctuates from time to time but that at the end of 1934 said company was operating 1474 stores; at the end of 1935, 1481; at the end of 1936, 1496; and is at present operating 1519. That during 1934, 1935 and 1936 and at the time all of the dividends here in question were paid J. C. Penney Company was operating 48 stores in the State of Wisconsin. That J. C. Penney Company is now operating 50 stores in the State of Wisconsin.

That J. C. Penney Company has a statutory office in Wilmington, Delaware, as required by the laws of the State of Delaware. That its principal office for the transaction of business is at No. 330 West 34th Street, New York City. That the total proceeds from sales of goods in Wisconsin stores and in stores in all other States are deposited in local banks. From such accounts, payments are made for payrolls, rents, advertising and other local expenses. The remainder is transmitted to the Company at New York City, and deposited to 92 the general credit of J. C. Penney Company in New York banks where it immediately loses its identity as money derived from any particular source. Funds so deposited to the credit of the Company in New York are used to pay salaries, general overhead expenses of the New York and other offices, taxes and dividends. Checks are likewise drawn upon these accounts of the Company in payment for merchandise purchased from all sources and shipped to all stores of the Company, including those in Wisconsin. That all of

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the stock books, minute books, and secretary's records of J. C. Penney Company are kept within the State of New York. All transfers of shares of the Company are made in New York by the Chemical Bank & Trust Company. That all directors, stockholders and other official meetings of J. C. Penney Company are held in the State of New York. That at directors' meetings held in the principal offices of the Company at 330 West 34th Street, New York City, the following dividends were declared payable:

Dates Paid	Total Amount Paid to Shareholders	Amount per Share
12/31/35	\$ 5,555,214.00	\$2.25
3/31/36	1,851,738.00	.75
6/30/36	1,851,738.00	.75
9/30/36	2,468,984.00	1.00
12/15/36	11,727,674.00	4.75

That the actual payment of said dividends was effected by the executive officers of the Company who caused checks to be drawn upon the accounts of the Company in its New York banks payable to the stockholders of record upon each dividend record date. That such checks were placed in envelopes addressed to each stockholder at his address as the same appeared from the records of the Company upon the date of payment of such dividend. That all of the books and records of the company necessary in the payment of such dividends are situated in the State of New York.

93 That no act in connection with the payment of

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said dividends was performed inside of the State of Wisconsin and no act in connection with receipt of said dividends was performed within said State except that certain of the stockholders of the Company reside within the State of Wisconsin and received their checks by mail.

That there is attached hereto as Exhibit "B" a statement setting forth the total number of stockholders of J. C. Penney Company upon each of the dividend dates in question. Said statement shows the approximate number of stockholders of the Company residing in each State of the United States and also the number residing in the District of Columbia and foreign countries upon each of said dividend payment dates. That on the record dates for payment of the dividends noted below persons residing and having a mail address in the State of Wisconsin held the numbers of shares of stock and received the dividends noted below:

Date	Shares	Dividend per sh.
12/31/35	32,918	\$2.25
3/31/36	33,086	.75
6/30/36	33,760	.75
9/30/36	34,097	1.00
12/25/36	28,031	4.75

That the following table shows (1) total amounts received by Wisconsin residents on the payment of the above dividends; (2) the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings; (this is calcu-

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lated by the use of the percentages used by the Tax Commission in reaching its assessment. See Exhibit A); (3) the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings.

94 Dividend Date	(1)	(2)	(3)
12/31/35	\$74,065.50 x .035096	\$2,599.40 x .025641	\$66.65
3/31/36	24,814.50 x .038558	956.80 x "	24.53
6/30/36	25,320.00 x "	976.29 x "	25.03
9/30/36	34,097.00 x "	1,314.71 x "	33.71
12/15/36	133,147.25 x "	5,133.89 x "	131.64
		Total	\$281.56

Penalties and interest on the above taxes are as follows: (figured to April 30, 1937)

Tax	Penalty and Interest	Total
\$66.65	\$6.33	\$72.98
24.53	1.96	26.19
25.03	1.61	26.64
33.71	1.69	35.40
131.65	4.61	136.25
	Total	\$297.76

(Additional interest for May and June,
1937 — 2.82)

That the total amount therefore of said assessment of taxes, penalties and interest based upon dividends paid in the State of Wisconsin is \$300.58; that \$23,809.99 of said assessment represents the tax, penalty and interest on dividends received outside of Wisconsin by persons residing outside of the State of Wisconsin.

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That compliance with the Income Privilege Dividend Tax would require an extra or additional calculation or operation on the part of each employee participating in the determination of the amount of dividends payable to each stockholder of record, and in the issuance of the checks therefor, since the deduction of the amount of the tax would necessarily increase the work to that extent. That while it is impossible to itemize the cost of such compliance, it is apparent that considerable extra expense would be entailed.

- 95 3. That J. C. Penney Company sets forth the following specific reasons for its objections that Paragraph 3 of Chapter 505 of the Wisconsin Laws of 1935 under which this tax is imposed, is unconstitutional:

(a) Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section I of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Wisconsin Constitution and deprives J. C. Penney Company and/or its stockholders of property without due process of law because it attempts to levy an excise tax upon the privilege of paying and receiving dividends out of income derived from property located and business transacted in Wisconsin when no act in connection with the payment and receipt of such dividends took place within the State of Wisconsin except the receipt of such dividends as were paid to Wisconsin stockholders. Furthermore, the funds from which said dividends were paid

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cannot be said to be Wisconsin funds but are general funds of the Company deposited in a New York bank and derived from remittances from stores in all of the 48 states and general deposits by the New York office of the Company.

That the State of Wisconsin further has no power to levy any excise tax on the privilege of receiving and paying out dividends since said privilege is not granted by and could not constitutionally be denied by the State of Wisconsin, such privilege being granted under the laws of the State of Delaware and/or the laws of the State of New York.

- 96 That even if said tax might be held to be constitutional from a jurisdictional standpoint in so far as it levies a tax upon dividends of foreign corporations paid to and received by Wisconsin residents within the State and/or as to dividends paid by Wisconsin corporations, said act so applied would be contrary to Section I of the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1, of the Wisconsin Constitution since it would be a denial of the equal protection of the laws to residents of Wisconsin and Wisconsin corporations would not be uniform and would contain unreasonable exemptions.

That the tax is on the *payment and receipt* of dividends and that as it is in part levied upon an unconstitutional subject and as no basis for apportionment exists the whole assessment is invalid.

That it is apparent from the structure of Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935, under which this tax is assessed, that the Legislature contemplated that a tax would be imposed upon all dividends paid from earnings derived from business and property within the State. To restrict the application of the law to dividends received within the State of Wisconsin would so alter and restrict it that it is apparent the Legislature would not have passed it in so limited a form. Consequently, the entire law is ineffective notwithstanding the provisions of Section 4 of Chapter 505 of the Wisconsin Session Laws of 1935.

97 That even if the tax might be held to be valid in so far as it levies a tax on dividends paid to and received by Wisconsin residents within the State, it is invalid in so far as it purports to levy a tax on dividends paid and received outside of Wisconsin by non-residents of Wisconsin. In such cases the entire payment and receipt of said dividends takes place outside of the State of Wisconsin and consequently said State has no jurisdiction to levy an excise tax. That \$23,890.99 of said assessment represents taxes, penalties and interest levied upon the payment of such dividends. This argument is presented as an alternative and is not to be construed as an admission that the law is valid in so far as it taxes dividends paid to Wisconsin residents or as an abandonment of the principal position here taken that the whole tax is invalid.

(b) That said tax is further unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 9, of the Constitution of the State of Wisconsin because it is a direct tax upon the J. C. Penney Company stock. The State of Wisconsin has no jurisdiction to tax said stock in so far as it is owned by persons not residing within the state. \$23,890.99 of this assessment was levied with respect to dividends paid upon stock owned by non-residents of the State of Wisconsin.

98 (c) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1, of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 9, of the Wisconsin Constitution and deprives J. C. Penney Company of liberty and property without due process of law in that it requires it to file returns, keep detailed figures and accounts, to collect the tax by making deductions from dividends paid and to perform numerous other acts within the State of New York. The State of Wisconsin has no jurisdiction to require J. C. Penney Company to do acts within the State of New York in order to assist it in collecting an excise or any other sort of tax.

(d) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Wisconsin Constitution, because when declared a dividend becomes

a debt of the company. The tax is in effect a direct tax on such debt which has no taxable situs in the State of Wisconsin.

(e) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9, of the Wisconsin Constitution, because it attempts to levy a tax upon dividends paid from earnings accumulated before its passage. That annual earnings cannot be apportioned as to time and that therefore the tax is unconstitutional as to 1936 dividends as well as 1935, because it is retroactive and in effect a tax upon accumulated surplus which does not have a taxable situs in the State of Wisconsin.

(f) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article VII, Section 1, of the Wisconsin Constitution because it is an excise on the payment and receipt of dividends paid out of Wisconsin earnings. Other earnings are exempt. Said exemption is a denial of the equal protection of the laws and unreasonable. Said tax is also not uniform.

(g) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Article 1, Section 10, of the Consti-

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tution of the United States and under Article I, Section 12 of the Wisconsin Constitution because it impairs the obligation of contracts. Said law impairs the contract of the stockholders with the corporation under the general corporate charter and under the dividend resolutions by which the shareholder received a right to the dividends in question. Said law further impairs the contract of the corporation with the States of Delaware, New York and Wisconsin.

(h) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Article 4, Section 1, of the Constitution of the United States because it fails to give full faith and credit to the laws of New York and Delaware and the corporate charter, by-laws and resolutions of J. C. Penney Company drawn pursuant thereto which give it the right to conduct its business and declare and pay dividends in said States.

(i) That Section 3 of Chapter 505 of the Wisconsin Session Laws of 1935 is unconstitutional under Article 1, Section 8, of the Constitution of the United States because it interferes with the power of Congress to regulate commerce among the several States. Said law interferes with the free transmission of corporate funds from State to State.

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Statement of Number of Stockholders of J. C. Penney Company
According to States

State	As at 12/20/35	As at 3/20/36	As at 6/20/36	As at 9/18/36	As at 12/4/36	As at 3/16/37	As at 6/16/37
Alabama	38	38	38	39	40	44	45
Arizona	87	85	87	88	84	98	101
Arkansas	28	28	28	29	28	32	33
California	994	965	983	994	957	1116	1149
Colorado	168	188	191	193	212	217	223
Connecticut	183	195	199	201	210	226	232
Delaware	25	27	27	27	28	31	32
Florida	67	77	79	80	89	89	92
Georgia	81	88	89	90	97	101	104
Idaho	109	105	107	108	104	122	125
Illinois	595	625	637	644	672	723	744
Indiana	211	213	217	220	222	246	254
Iowa	228	226	230	233	228	261	269
Kansas	187	180	182	184	175	207	213
Kentucky	78	89	90	91	102	103	106
Louisiana	33	36	36	37	39	41	42
Maine	30	27	27	27	25	31	32
Maryland	96	96	98	99	98	111	115
Massachusetts	1153	1208	1231	1244	1292	1397	1437
Michigan	388	383	390	395	389	443	456
Minnesota	273	279	284	287	292	323	332
Mississippi	45	43	44	44	44	50	51
Missouri	505	545	555	561	595	629	648
Montana	117	115	118	119	117	113	137
Nebraska	145	145	147	149	146	167	172
Nevada	31	32	32	33	33	37	38
New Hampshire	56	65	66	67	76	75	77
New Jersey	317	334	343	346	363	389	400
New Mexico	31	33	34	34	34	38	39
New York	2696	2771	2823	2853	2911	3203	3294
North Carolina	107	105	107	108	104	122	125
North Dakota	122	115	118	119	112	133	137
Ohio	410	419	427	431	438	484	498
Oklahoma	110	113	115	116	117	130	134
Oregon	337	334	340	344	337	386	397
Pennsylvania	657	695	708	715	749	803	826
Rhode Island	89	95	97	98	103	110	113
South Carolina	33	33	34	34	34	38	39
South Dakota	100	96	98	99	93	111	115
Tennessee	58	56	57	57	54	65	66
Texas	208	206	209	212	208	238	245
Utah	177	188	192	193	202	217	223
Vermont	19	20	21	21	22	23	24
Virginia	58	62	63	64	68	72	74
Washington	265	266	271	275	272	308	317
West Virginia	46	44	45	46	44	51	53
Wisconsin	391	393	401	405	406	455	468
Wyoming	31	29	30	30	29	34	35
District of Columbia	110	114	116	118	119	132	136
Foreign	62	63	65	65	68	73	76
TOTAL	12385	12687	12927	13066	13281	14668	15093

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**J. C. PENNEY COMPANY REQUESTS A
HEARING BEFORE THE TAX COMMISSION
UPON SAID ASSESSMENT AND RESPECT-
FULLY REQUEST THAT SAID ASSESS-
MENT BE WITHDRAWN.**

J. C. PENNEY COMPANY, INC.,

By: E. C. Sams.

Attest:

A. J. Raskopf.

101 • **EXHIBIT A** attached to Exhibit 8, is a copy of the original computation made by the Wisconsin Tax Commission of the taxes due from the appellant, which was enclosed in letter to appellant from Wisconsin Tax Commission dated March 31, 1937, and an exact copy of this Exhibit A is attached as Exhibit A to Exhibit 1 at B. 62, at C. 46, and consequently is omitted at this portion of the case.

102-103 **Exhibit B—Folded Insert.**

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104-106 **EXHIBIT 9**, Letter of A. J. Raskopf, Witness
at Hearing, to Attorneys for Appellant, Incorporated in record by agreement:

C
O
P
Y

105

J. C. PENNEY COMPANY
Incorporated
330 West 34th Street
New York, N. Y.

May 6, 1938

Messrs. Gwinn & Pell,
522 Fifth Avenue,
New York City.

Gentlemen:

Attention of Mr. Pell.

Re: Wisconsin Privilege Dividend Tax.

We are returning the transcript of the writer's testimony of April 11 before the Wisconsin Tax Commission in connection with the above.

In going through this, we find that Mr. Best, attorney for the Commission, asked the writer in reference to the Wisconsin store Managers the question "Does he buy the merchandise for his store," to which I replied, "He does." It is just possible that this statement which I made requires

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some further explanation, which we are giving in this letter.

The Managers do buy merchandise for their stores but they do not have the actual contact with the vendors of the merchandise from whom the company buys. The company has a large staff of buyers in the New York and St. Louis offices who scour the markets throughout the country in order to obtain the best possible merchandise buys. These buyers enter into contracts with the various manufacturers of the goods that they select and then send to the various stores throughout the chain price lists and descriptive circulars on the items of merchandise for which they have contracted.

The Managers then go over these price lists and determine what merchandise they require for the operation of their stores. There is no compulsion about their taking any or all of the items of merchandise presented to them in price list form by the Buying staff, but the selection of the goods is left to the judgment of the Manager as to his needs in the community in which he operates and the saleability of the goods. Therefore, it can of course be said that the Managers buy merchandise for their stores since they are obliged to make up orders for the various lines of merchandise that they desire to purchase for their store operations and the stores are charged with the cost of all goods so purchased by the Managers. In this respect our operations differ from that of some of the other organizations where, instead of giving the Manager the opportunity to

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select various items of merchandise for his store operation, goods purchased by the central buying staff is forwarded to the stores and the stores are required to do their best toward selling it.

106 Messrs. Gwinn & Pell,

May 6, 1938

The writer submits this additional statement as it may be considered advisable to have it included with his testimony before the Commission on April 11 in order that there may be no misunderstanding on this particular question as submitted by Mr. Best and as answered by the writer.

Very truly yours,

(Signed) A. J. RASKOPF
Secretary

AJR:MQ

107-108 *EXHIBIT 10*, Letter of Counsel for Wisconsin Tax Commission, Consenting to Treat Exhibit 10 as Part of the Record and Agreeing to Corrections in Record.

(Omitted.)

109-110 *ADMISSION OF SERVICE* by Wisconsin Tax Commission, on Notice of Appeal to Circuit Court.

(Omitted.)

111-126 *NOTICE OF APPEAL* by Appellant to Circuit Court (included at C. 2-21 herein).

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Record.

127-128 **ANSWER OF TAX COMMISSION** on Appeal to Circuit Court (included at C. 21 herein).

129 **ADMISSION OF SERVICE** of Appellant on Brief to Circuit Court.

(Omitted.)

130-174 **BRIEF** of Appellant in Circuit Court.

(Omitted.)

175-219 **BRIEF** of Wisconsin Tax Commission in Circuit Court.

(Omitted.)

220 **STIPULATION** that Appeal in Circuit Court Might Proceed without Further Notice.

(Omitted.)

221-222 **MEMORANDUM DECISION** by Circuit Court for Dane County, Wisconsin and Order Confirming Assessment of Tax Commission and Directing Judgment:

(Title omitted.)

221 The above entitled matter comes before this Court upon appeal taken by J. C. Penney Company, a foreign corporation, from the decision and order of the Wisconsin Tax Commission dated July 21, 1938.

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Record.

Briefs were filed by Gwinn & Pell of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, representing the J. C. Penney Company, appellant, and by the Attorney General of the State of Wisconsin and H. H. Persons, Esq., Assistant Attorney General, representing the respondent.

The court has considered the issues and matters raised on this appeal and which are covered in briefs filed by the respective parties, and particularly the constitutional question raised by the appellant; in view of the decision of the Supreme Court of the State of Wisconsin in the case of *State of Wis. ex rel., Froedert Grain & Malting Co., Inc. vs. Wisconsin Tax Commission*, 221 Wis. 225, and particularly in view of the decision rendered on the motion for rehearing in that case, this Court feels that it has no alternative except to hold the law under which the assessments were levied constitutional; and accordingly the said order of the Wisconsin Tax Commission affirming the assessment or assessments involved in this appeal should be confirmed.

IT IS, THEREFORE, ORDERED, that the assessment involved on this appeal by the Wisconsin Tax Commission against J. C. Penney Company, a foreign corporation, be and the same is
222 hereby confirmed, and the judgment confirming said assessment be entered herein.

AUGUST C. HOPPMANN (Copy)
Circuit Judge.

Dated, June 10, 1939.

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Record.
223

WAIVER OF NOTICE of Application for
Entry of Judgment.

(Omitted.)

224-225 **JUDGMENT** of Circuit Court for Dane
County, Wisconsin, on Appeal from Tax Com-
mission:

(Title omitted.)

At the regular March 1939 term of the
Circuit Court, begun and held in the
Court House in the City of Madison in
said county, and on the 10 day of June,
1939 of said term. Present the Hon. Au-
gust C. Hoppmann, Circuit Judge pre-
siding.

The above entitled proceeding was brought to
review an order of the Wisconsin Tax Commis-
sion dated July 21st, 1938, which said order of the
Wisconsin Tax Commission affirmed the assess-
ments and the tax imposed upon dividends de-
clared by the J. C. Penney Company, a foreign
corporation, being dividends of December 31st,
1935, March 1st, 1936, June 30th 1936, September
30th, 1936 and December 15th, 1936; the matter
coming on to be heard at said term under the pro-
visions of the Wisconsin Statutes, and particu-
larly Sec. 71.16 thereof, the appellant appearing
by Gwinn & Pell of New York City, and Ela,
Christianson & Ela of Madison, Wisconsin, its at-
torneys, and the respondent appearing by the
Attorney General and Harold H. Persons, Esq.,

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Record.

Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant J. C. Penney Company, a foreign corporation,

225 Now, Therefore, on the record, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

IT IS ADJUDGED that said order of the Wisconsin Tax Commission dated July 21st, 1938 and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant J. C. Penney Company shall pay the clerk's fee.

By the Court,

AUGUST C. HOPPMANN (Copy)
Judge.

226-228 NOTICE OF APPEAL to Supreme Court.
(Omitted.)

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Record.

229 *NOTICE OF DEPOSIT* in Lieu of Undertaking on Appeal.

(Omitted.)

230 *RETURN OF CLERK* of Circuit Court to Supreme Court on Appeal.

(Omitted.)

Respectfully submitted,

GWINN & PELL,
522 Fifth Avenue,
New York City.

ELA, CHRISTIANSON & ELA,
1 West Main Street,
Madison, Wisconsin.

Attorneys for Appellant.

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Pleas before the Supreme Court of the State of Wisconsin at a term thereof begun and held at the Capitol in Madison, the seat of government of said State on the Second Tuesday, to-wit: the Eighth day of August, A. D. 1939.

Present: Hon. Marvin B. Rosenberry, Chief Justice, Hon. Chester A. Fowler, Hon. Oscar M. Fritz, Hon. Edward T. Fairchild, Hon. John D. Wickhem, Hon. George B. Nelson, Hon. Joseph Martin, Justices. Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the fifteenth day of June in the year of our Lord One Thousand Nine Hundred and Thirty-nine came into the office of the Clerk of the Supreme Court of the State of Wisconsin, the J. C. Penney Company, a foreign corporation, by its attorneys and filed in said Court its certain Notice of Appeal, according to the statute in such case made and provided, and also the Return to such appeal, of the Clerk of the Circuit Court of Dane County, in said State, in words and figures following, that is to say:

STATE OF WISCONSIN, IN CIRCUIT COURT FOR DANE COUNTY

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

Circuit Court Dane County, Wis. Filed June 13, 1939,
Myrtle L. Hansen, Clerk.

NOTICE OF APPEAL

You Will Please Take Notice that J. C. Penney Company, a foreign corporation, appellant in the above proceeding, hereby appeals to the Supreme Court of the State of Wisconsin from the judgment rendered and entered in this proceeding in the Circuit Court for Dane County, Wisconsin on the 10th day of June, 1939, in favor of the respondent and against the appellant, confirming the order of the Wisconsin Tax Commission dated July 21st, 1938 and the assessment and tax referred to therein, and from the whole of said judgment.

A copy of said judgment appealed from is hereto annexed.

Dated June 13, 1939.

Gwinn & Pell & Ela, Christianson & Ela, Attorneys
for Appellant.

To: John E. Martin, Esq., Atty. General of State of Wisconsin.

Harold H. Persons, Esq., Asst. Atty. General of State of Wis. Clerk of the Circuit Court for Dane County, Wisconsin.

Filed June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

IN CIRCUIT COURT FOR DANE COUNTY, STATE OF WISCONSIN
J. C. PENNEY COMPANY, a foreign corporation, Appellant,

VS.

WISCONSIN TAX COMMISSION, Respondent

JUDGMENT

Circuit Court Dane County, Wis., Filed June 13, 1939.
Myrtle L. Hansen, Clerk.

At the regular March 1939 term of the Circuit Court, begun and held in the Court House in the City of Madison in said county, and on the 10 day of June, 1939 of said term. Present the Hon. August C. Hoppmann, Circuit Judge presiding.

Filed Jun. 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

The above entitled proceeding was brought to review an order of the Wisconsin Tax Commission dated July 21st, 1938, which said order of the Wisconsin Tax Commission affirmed the assessments and the tax imposed upon dividends declared by the J. C. Penney Company, a foreign corporation, being dividends of December 31st, 1935, March 1st, 1936, June 30th, 1936, September 30th, 1936, and December 15th, 1936; the matter coming on to be heard at said term under the provisions of the Wisconsin Statutes, and particularly Sec. 71.16 thereof, the appellant appearing by Gwinn & Pell of New York City, and Ela, Christianson & Ela of Madison, Wisconsin, its attorneys; and the respondent appearing by the Attorney General and

Harold H. Persons, Esq., Assistant Attorney General of the State of Wisconsin, and the Court having on this 10 day of June, 1939 filed its decision confirming said order and said assessment and tax and directing that judgment be entered in accordance therewith, and notice as provided by Sec. 71.16 (8), Wisconsin Statutes, of application for the entry hereof having been duly waived in writing by the attorneys for the appellant J. C. Penney Company, a foreign corporation,

Now, therefore, on the record, files and proceedings in the above entitled appeal, and on motion of the attorneys for the Wisconsin Tax Commission,

It Is Adjudged that said order of the Wisconsin Tax Commission dated July 21st, 1938 and said assessment and tax be and the same are in all respects confirmed without costs to either party, except that the appellant J. C. Penney Company shall pay the clerk's fee.

By the Court,

August C. Hoppmann, Judge.

IN CIRCUIT COURT FOR DANE COUNTY, STATE OF WISCONSIN
J. C. PENNEY COMPANY, a foreign corporation, Appellant,
vs.

WISCONSIN TAX COMMISSION, Respondent

NOTICE OF DEPOSIT IN LIEU OF UNDERTAKING

You Will Please Take Notice that the appellant, J. C. Penney Company, a foreign corporation, pursuant to Section 274.14 of the Wisconsin Statutes of 1937, has deposited with the Clerk of the above court the sum of Two Hundred Fifty (\$250.00) Dollars, in lieu of any undertaking which would be necessary to perfect an appeal in said action.

Dated, June 13, 1939.

Gwinn & Pell and Ela, Christianson & Ela, Attorneys
for Appellant.

To: John E. Martin, Esq., Atty. General of State of Wisconsin. Harold H. Persons, Esq., Asst. Atty. General of State of Wis.

Filed June 15, 1939. Arthur A. McLeod, Clerk of
Supreme Court, Madison, Wis.

[Endorsements:] Original State of Wisconsin Circuit Court, Dane County. J. C. Penney Company, a foreign corporation, Appellant, vs. Wisconsin Tax Commission, Respondent. Notice of Appeal and Notice of Deposit in Lieu of Undertaking. Ela, Christianson & Ela 1 West Main Street Madison, Wis., Attorneys for Appellant. Due service admitted this 13th day of June, A. D. 1939. John E. Martin, Attorney General of Wisconsin, By H. H. Persons, Asst. Atty. General, attorneys for Respondent Wis. Tax Comm.

Service admitted this 13th day of June, 1939. Myrtle L. Hansen, Clerk.

Circuit Court Dane County, Wis., Filed June 13, 1939. Myrtle L. Hansen, Clerk.

Filed June 15, 1939. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

And afterwards, to-wit: on the 6th day of November, A. D. 1939, the following stipulation was filed in this cause:

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1939

No. 96

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Appellant-Plaintiff, by its attorneys at law, and John E. Martin, Attorney General of the State of Wisconsin and Harold H. Persons, Assistant Attorney General of the State of Wisconsin, as attorneys for the Wisconsin Tax Commission, Respondent, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin, that the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin, may be made

parties defendant and respondent in the above-entitled matter and that an order may be made and entered to that effect forthwith and without any further notice to any of the parties.

Dated October 30, 1939.

Gwinn & Pell; Ela, Christianson & Ela, Attorneys for Appellant-Plaintiff.

John E. Martin, Attorney General of the State of Wisconsin; Harold H. Persons, Assistant Attorney General of the State of Wisconsin, Attorneys for Respondent, Wisconsin Tax Commission, and for the State of Wisconsin and Elmer E. Barlow, Commissioner of Taxation of Wisconsin.

Upon the foregoing stipulation,

It Is Hereby Ordered: That the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of Wisconsin be and the same hereby are made defendants and respondents in the above-entitled matter.

Dated this 6th day of November, 1939.

By the Court.

Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin.

And afterwards to wit on the 7th day of November, A. D. 1939, the same being the 21st day of said term, the following proceedings were had in said cause in this Court:

DANE CIRCUIT COURT

J. C. PENNEY COMPANY, a foreign corporation, Appellant,
vs.

WISCONSIN TAX COMMISSION, Respondent.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by W. H. Dannat Pell, Esq., Roswell Dean Pine, Jr., Esq., and G. Burgess Ela, Esq., for the said appellant, and by Harold H. Persons, Esq., Assistant Attorney General, for the said respondent, and submitted, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit: on the 16th day of January, A. D. 1940, the same being the 4th day of said term, the

judgment of this Court was rendered in words and figures following, that is to say:

DANE CIRCUIT COURT

Opinion by Chief Justice Rosenberry

J. C. PENNEY COMPANY, a foreign corporation, Appellant,
vs.

WISCONSIN TAX COMMISSION, Respondent.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby reversed.

And that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter judgment setting aside the assessment.

Justice Fowler dissents.

Thereupon the opinion of the Court by Chief Justice Rosenberry, and the dissenting opinion of Justice Fowler, were filed in words and figures following, that is to say:

Filed Jan. 16, 1940. Arthur A. McLeod, Clerk of the Supreme Court, Madison, Wis.

IN SUPREME COURT, STATE OF WISCONSIN

August Term, 1939

No. 96

J. C. PENNEY Co., a foreign corporation, Appellant,

vs.

WISCONSIN TAX COMMISSION, Respondent.

Appeal from a judgment of the circuit court for Dane county: August C. Hoppmann, Circuit Judge, presiding. Reversed.

J. C. Penney Company, a foreign corporation, began this action on August 23, 1938, to set aside an order of the defendant, Wisconsin Tax Commission, dated July 21,

1938. From a judgment entered on June 10, 1939, confirming the assessment, plaintiff appeals.

The facts will be stated in the opinion.

ROSENBERY, C. J. The plaintiff is a Delaware corporation, having its statutory office at Wilmington, Delaware. It is engaged in the business of operating a nation wide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the state of Wisconsin but has no executive office of any kind located within the state. During the year 1934 it operated 47 stores in this state. In 1935 and 1936 it operated 48 stores in Wisconsin. During the year 1934, plaintiff had a total net income computed on the Wisconsin tax basis of \$16,022,607 and in 1935, a total net income of \$15,223,478. Applying the formula of the Wisconsin income tax statute (sec. 71.02), \$562,331 of the 1934 income was allocable to Wisconsin business and \$587,001 of the 1935 income was allocable to Wisconsin business. The plaintiff declared the following dividends:

On December 31, 1935, J. C. Penney Company declared a dividend of \$2.25 per share, making total dividend payments of \$5,555,214.00.

In 1936, J. C. Penney Company declared and paid the following dividends.

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36	\$.75	\$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

Pursuant to a notice of additional assessment, dated July 16, 1937, the Tax Commission assessed a privilege dividend tax which was ultimately adjusted at the sum of \$23,586.79. The plaintiff duly filed its application for hearing and made objection to the assessment within the period prescribed by law.

The plaintiff operates its business in the following manner: the total proceeds from sales of goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made,—payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the

treasurer's office in New York City and deposited in New York banks to the credit of the Company. No separate account is kept of the funds from the various states and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are drawn in payment for all merchandise purchased and shipped to the various stores. All of the stockbooks, minute books and secretary's records of the Company are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that state. All transfers of shares of stock are made by the New York transfer agent of the Company; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings. The actual payment of dividends is effected by checks drawn upon the accounts of the plaintiff Company in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders of the Company received their mail in this State. It appears from the evidence that 391 stockholders were residents of the State of Wisconsin as of the date of payment of the December 31, 1935, dividend as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 406 Wisconsin stockholders as against a total of 13,281 stockholders. If the tax had been levied upon the basis finally adopted by the Commission it would have amounted to \$274.54. The tax was levied pursuant to the provisions of sec. 3, ch. 505, Laws of 1935 as amended. This was the same as sec. 71.60 of the Laws of 1937 except the expiration date is July 1, 1937, instead of July 1, 1939. The law is as follows:

"(1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this State, there is hereby imposed a tax equal to two and one-half per centum of the amount of

such dividends declared and paid by all corporations (foreign and local), except those specified in paragraphs (d) and (g) of subsection (1) of section 71.05 of the statutes, after the passage and publication of this act and prior to July 1, 1939. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

The plaintiff contends that this law as applied to a foreign corporation doing business as plaintiff does business is invalid for the reason that it deprives the plaintiff of its property without due process of law in contravention of the Fourteenth Amendment to the constitution of the United States and Art. VIII, sec. 1, of the constitution of the state of Wisconsin. Stated specifically it is the contention of the plaintiff that the state of Wisconsin has no jurisdiction to impose an excise tax upon a transaction which takes place beyond its borders; that all of the acts of the plaintiff com-

pany in the declaration and payment of dividends and the acts of its stockholders in receiving them outside of the state are insufficient to confer jurisdiction to tax dividends declared by a corporation organized under the laws of a sister state. As already stated only an inconsiderable part of the dividend is received through the mails by Wisconsin stockholders.

This Court had the constitutionality of sec. 3, ch. 505, Laws of 1935, as amended before it in *State ex rel. Froedtert G. & M. Co., Inc., v. Tax Comm. of Wisconsin* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52. That was an action for a declaratory judgment and was brought by a Wisconsin corporation. The Court held that the tax imposed upon the Wisconsin corporation pursuant to the provisions of sec. 3, ch. 505, was a valid tax. In that case the Court held that the language of the act "for the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)" imposed an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders.

There was a motion for a rehearing in the *Froedtert* case and briefs amicus curiae were filed by counsel appearing on behalf of foreign corporations. While the application of the law to foreign corporations was not before the Court upon the pleadings in the case, the Court concluded to consider the validity of the act as applied to foreign corporations and held:

"We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived; and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis Case*, *supra*, about imposing upon the employer liability for

the income tax on salaries of nonresidents earned within the state."

This decision of the Court is vigorously assailed. We are earnestly besought to reconsider the decision of the Froedtert case so far as it applies to foreign corporations. It is agreed on all sides that the tax in question is an excise tax and this Court so held in the Froedtert case. The Court in effect held that the tax was an excise tax "for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state" and was therefore subject to the jurisdiction of the state as are incomes and inheritances. It is apparent that upon this basis the tax imposed by subsec. (1), sec. 1 of the act can not be imposed upon dividends declared by a foreign corporation because they are not declared within this state nor is the privilege one granted by this state. To meet this objection on the motion for rehearing the Court held that a dividend declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this state because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state.

Since the decision was rendered in the Froedtert case, on May 4, 1936, the Supreme Court of the United States has considered and decided *Conn. General Co. v. Johnson* (1938), 303 U. S. 77. The appellant in that case was a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses if any, were payable. Sec. 14 of Art. XIII of the constitution of the state of California as supplemented by legislative enactment, lays upon every insurance company doing business within the state an annual tax of 2.6% "upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state."

It is apparent from a consideration of this provision that if reinsurance premiums are paid to companies or associations not authorized to do business within the state of Cali-

for California, no deduction is made from the amount of the gross premium received and the amount of the gross premium becomes the measure of the tax. When, however, a part of the gross premium received and paid within the state of California is paid to a company authorized to do business in California, the amount so paid for reinsurance is deductible from the gross premium received. It would seem that where the tax was solely upon a premium earned in the state of California paid for reinsurance to another company authorized to do business in California, that it might be held California retained jurisdiction for the purposes of imposing a tax upon the reinsurance premium so paid. The Supreme Court of California pointed out that the provision for the deduction was intended to avoid double taxation without any loss of revenue to the state; that for the purpose of accomplishing that end the deduction of reinsurance premiums paid to the companies authorized to do business in the state is allowed on the theory that the burden will be passed on to the reinsurer who, being authorized to do business in the state, will be taxed on the reinsurance premiums as a means of equalizing the tax.

The Supreme Court of the United States, however, held that a reinsurance transaction which took place within the state of Connecticut, was not subject to taxation by California although the transaction dealt entirely with California business, both parties to the transaction being authorized to do business within the state of California and the entire amount of the reinsurance premium was earned in California.

The reason for the invalidity of the tax was stated by the Supreme Court of the United States in the following language:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted

to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere (Citing). It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

In the Froedtert case we rejected the contention that the tax was a tax on property (p. 235) and rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the transaction of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. In the Conn. General Co. case, supra, the Supreme Court of the United States made the further statement:

"Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.

"The grant by the state of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege, which California does not grant, of doing business elsewhere (Citing). Even though a tax on the privilege of doing business within the state in insuring residents and risks within it may be measured by the premiums collected, including those mailed to the home office without the state (Citing) and though the writing of policies without the state insuring residents and risks within it is taxable because within the granted privilege (Citing), there is no basis for saying that reinsurance which does not run to the original insured, and which from its inception to its termination involves no action taken within California, even the settlement and adjustment of claims, is embraced in any privilege granted by

that state (Citing). All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

This determination of the Supreme Court of the United States clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the Conn. General Co. case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the dividend in question. Certainly the payment of a reinsurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.

Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case. We have given the matter thorough and careful consideration because of the importance of the

question involved and the effect a ruling adverse to the defendant will have upon State finances. While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. The question here involved is one of the incidence of taxation and not whether the State has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.

We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States.

It is hardly necessary to say that the considerations which require us to hold sec. 3 of the act, sec. 71.60, Stats., to be invalid when applied to foreign corporations have no application to the declaring and receiving of dividends of a Wisconsin corporation. It has been suggested that if the section is invalid as applied to foreign corporations, it should be held invalid as a whole because of the fact that it creates a discrimination as respects tax liability between domestic and foreign corporations in this respect, Wisconsin earnings of a domestic corporation may be taxed under the section while Wisconsin earnings of a foreign corporation wholly escape taxation under the section.

Sec. 4 of the act, sec. 71.60, Stats., provides:

"If any section, subsection, paragraph, provision or part of this act, or its application to any person or circumstance shall be held unconstitutional, such decision shall not affect the constitutionality of any other section, subsection, provision or part, or its application to other persons or circumstances."

While this declaration of legislative policy is not absolutely controlling upon the court, it will not be ignored except in a case where it clearly appears that the remainder of the act is dependent on the part held invalid. The effect of the statute is merely to reverse the presumption of inseparability which ordinarily obtains and to create the opposite one of separability. *Carter v. Carter Coal Co.* (1935), 298 U. S. 238, 312, *Mazurek v. Farmers Mutual Life Ins. Co.* (1935), 320 Pa. 33, 102, A. L. R. 798.

Whatever the economic effect may be it is plain that the application of the act to Wisconsin corporations is not legally dependent on its application to foreign corporations. The legislature has declared in the most emphatic language that one may stand without the other. We discover no ground upon which it may be said the legislative declaration is not controlling in this case.

By the Court.—Judgment reversed and cause remanded with directions to enter judgment setting aside the assessment.

IN SUPREME COURT, STATE OF WISCONSIN

August Calendar, 1939 January Term, 1940

No. 96

J. C. PENNEY COMPANY, a foreign corporation, Appellant,

v.

WISCONSIN TAX COMMISSION, Respondent.

FOWLER, J. (Dissenting.) This court held in *Froedert v. Tax Commission*, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, that the statute involved herein was constitutional, and the instant decision reiterates that holding as applied to Wisconsin corporations. The instant decision holds that as applied to corporations organized under the laws of sister States declaring dividends outside the State resulting from business conducted in this State the statute is unconstitutional. The instant ruling is based upon the ruling of the Supreme Court of the United States in the case of *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77. A ruling of the Supreme Court of the United States on a question under the constitution of the United States governs the

ruling of this court in a case that involves the same state of facts. But a decision in one case does not govern the decision of another unless the facts of the latter are so like those in the former as to render the reason of the former as applicable to the latter as to the former. Thus it is that the decision in the case cited does not govern the decision in the instant case if the facts of the instant case can be so differentiated as to render the reason of that case inapplicable here.

It is quite true that the Connecticut General Life Ins. Co. case rules this case if we take literally statements of the opinion in that case, quoted in the instant opinion, and apply them to the factual situation here involved. But the instant factual situation, while in some respects similar, is, as I view it, materially different in one respect from that involved in that case. It is said in the opinion in that case that "the due process clause denies to the State power to tax * * * the corporation's property and activities elsewhere." The reason for that statement is stated to be that jurisdiction of the State of California to impose the tax is "to be ascertained by reference to the incidence of the tax upon its objects." The object of the California tax was the reinsurance premium received and contracted for in the State of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the State of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. The reason not applying, neither does the rule. So at least it seems to me. Under this concept, the statute here involved remains valid unless subsequently declared invalid by the Supreme Court of the United States.

The tax here involved is laid upon the declaration of dividends upon corporate earnings within this state. It seems to me that if such a tax may be laid upon the declaration of dividends so earned by a Wisconsin corporation within the state, it may per force be laid upon the declara-

tion of dividends so earned by a foreign corporation, regardless of whether the dividends be declared within or without the state. A Wisconsin corporation conducting a business in Wisconsin at Beloit would be subject to taxation upon a declaration of dividends based upon its earnings within the state, regardless of whether the declaration were made in Beloit or across the state line in Illinois at South Beloit. The directors declaring the dividend could not escape the tax merely by crossing the state line to declare it. To permit this would be to exalt the mere mechanics of the matter over the reason of it. Nor, by the same token, as it seems to me, is it material whether the declaration of dividends based on earnings made in Wisconsin, are declared in Wisconsin or in New York or Delaware. No corporation of one state, that comes into another state and does business there in competition with corporations of that state, should be permitted to escape any taxation with which the corporations of that state with which it competes are burdened merely because it is organized under the laws of another state or because it receives or holds or handles its Wisconsin earnings in another state. To permit corporations merely by organizing in one state and going into other states to conduct their operations to escape burdens of taxation or other disadvantages to which local corporations with which they compete are subject under the laws of the state in which they operate is wrong in principle.

Some tax decisions of the Supreme Court of the United States rendered since *Connecticut General Life Ins. Co. v. Johnson*, *supra*, was decided, and some rendered shortly before, seem to me to show that notwithstanding what is said in the opinion in that case, the plaintiff herein has a tax situs in Wisconsin for the imposition of the instant tax.

Newark Fire Ins. Co. v. State Board, 307 U. S. 313, sustained the taxation in New Jersey of the paid up capital stock and surplus of a New Jersey corporation which kept its main office in New York and there kept its securities and the bulk of its cash. Mr. Justice Reed wrote an opinion concurred in by three other members of the court. This opinion refers to the "fiction" by which intangibles have become taxable in a jurisdiction where the corporation has acquired a "tax situs." It is said, p. 321, as the reason for recognition of such tax situs, that:—

"The conception of a business situs for intangibles enables the tax gathering entity to distribute the burden of its support equitably among those receiving its protection. It makes the notion of a tax situs for particular intangibles more definite. It is not the substitution of a new fiction as to the mass of choses in action for the established fiction of a tax situs at the place of incorporation. To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

The tax involved in that case was a property tax, but the same reason that applies to a tax situs for property taxation of intangibles applies for establishing a tax situs for the purpose of excise taxation when, as in the instant case, the thing taxed is 'definitely connected' "as an integral part of the local activity." The basis of the taxation of appellant herein is that the declaration of the dividend on which the excise tax against the corporation is based is so definitely connected as an integral part of the local activity of the taxpayer in earning the dividends on which the tax is computed as to give it a tax situs in Wisconsin.

In this case Mr. Justice Frankfurter also wrote an opinion, also concurred in by three other justices, in which it is said in respect of interference with taxation by the states:

"Wise tax policy is one thing; constitutional prohibition is quite another. The task of devising means for distributing the burdens of taxation equitably has always challenged the wisdom of the wisest financial statement. Never has this been more true than today when wealth has so largely become the capitalization of expectancies derived from a complicated network of human relations. The adjustment of such relationships, with due regard to the promotion of enterprise and to the fiscal needs of different governments with which these relations are entwined, is peculiarly a phase of empirical legislation. It belongs to that range of the experimental activities of government which should not be constrained by rigid and artificial legal concepts. Especially important is it to abstain from intervention within the autonomous area of the legislative taxing power where there is no claim of encroachment by the states upon powers granted to the National

Government. It is not for us to sit in judgment on attempts by the states to evolve fair tax policies. When a tax appropriately challenged before us is not found to be in plain violation of the Constitution our task is ended."

In *Smith v. Ajax Pipe Line Co.*, 87 F. (2d) 568, it was held that a Delaware corporation keeping its funds in a bank in New York but having its principal place of business in Missouri and keeping its books and records there had a tax situs in Missouri, and that the state of Missouri might tax its bank deposits kept in New York. Similarly in *First Bank Corporation v. Minnesota*, 301 U. S. 234, Minnesota was permitted to tax a Delaware corporation on stock in Montana and Dakota banks. It is said on p. 241 of the opinion:

"We have recently had occasion to point out that enjoyment by the resident of a state of the protection of its laws is inseparable from responsibility for sharing the costs of its government."

The reason back of the rule permitting taxation of a corporation of one state to be taxed in another state on its intangibles attributable to business in that other state is as stated in the above quotation. That reason applies just as aptly and just as strongly to uphold the excise tax here involved and upon that reason the instant tax should be upheld.

"The case of *Curry v. McCanless*, 307 U. S. 357, 83 L. Ed. 1339, bears upon the question here involved. It deals with an excise tax based on devolution of intangibles by death. A resident of Tennessee created a trust whereby securities were given to trustees residing in Alabama for purposes declared in the instrument of trust. The donor by the instrument of trust reserved to herself the right to dispose of the corpus by will. By her will she bequeathed the corpus to the trustees with direction to turn it over to residents of Alabama. Tennessee based a death tax upon the exercise by the donor of the power of appointment by will. Alabama imposed a death tax upon the trustees in Alabama. The question involved was whether both states might impose the tax and it was held that they might. That the devolution of the intangibles occurred in Tennessee, where the donor resided at her death, did not deprive the state of

Alabama from imposing a tax on that devolution. The thing that transferred the intangibles and the right to them was the will activated by the donor's death. The thing that effected the transfer occurred in one state, yet the transfer was taxable in the other. I see no more reason why the mere fact in the instant case that the devolution resulting from the declaration of the dividend occurred in New York should defeat the devolution tax imposed by Wisconsin than that the mere fact that the occurrence of the devolution in Tennessee should defeat the Alabama tax. The connection between the devolution and the Alabama's taxpayer's acquisition made the devolution to him taxable although that devolution occurred in Tennessee. By the same token the connection between the declaration of the dividend in New York and the earning of those dividends in Wisconsin made the devolution effected by the declaration of the dividend in New York taxable in Wisconsin.

In *Ford Motor Co. v. Beauchamp*, — U. S. —, decided December 11, 1929, an excise or franchise tax imposed by the state of Texas upon a foreign corporation doing business in that state and the other states of the United States was sustained. The tax was based upon the proportion of the corporation's capital employed in Texas computed on the percentage of the corporation's sales made within Texas. In the opinion of the court it is said:

"The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the State sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the State, no provision of the Federal Constitution is violated."

The statement next above quoted, down to the last sentence thereof, applies verbatim to the instant case. The last sentence may be paraphrased: "When that charge, as here," is based upon the amount of business done in Wisconsin, "no provision of the Federal Constitution is violated."

For the reasons above stated I think the judgment of the circuit court should be affirmed.

In Supreme Court, State of Wisconsin. J. C. Penney Company, a foreign corporation, Appellant, v. Wisconsin Tax Commission, Respondent.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause, in this Court.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Madison, this 29th day of March, A. D. 1940.

Arthur A. McLeod, Clerk of Supreme Court, Wisconsin. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1940

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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APR 10 1940

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 46

STATE OF WISCONSIN AND ELMER E. BARLOW, AS
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,
Petitioners,

vs.

J. C. PENNEY COMPANY, A DELAWARE CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WISCONSIN.

JOHN E. MARTIN,
Attorney General of Wisconsin,
JAMES WARD RECTOR,

Deputy Attorney General of Wisconsin,
HAROLD H. PERSONS,
Assistant Attorney General of Wisconsin,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 892

**STATE OF WISCONSIN AND ELMER E. BARLOW; AS
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,**
Petitioners,

vs.

J. C. PENNEY COMPANY, A DELAWARE CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of the State of Wisconsin and Elmer E. Barlow, as Commissioner of Taxation of the State of Wisconsin, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This petition is filed to obtain a review of the judgment of the Supreme Court of the State of Wisconsin, dated January 16, 1940, in the case of *J. C. Penney Co., a foreign corporation v. Wisconsin Tax Commission*, holding invalid an assessment of taxes against the J. C. Penney Company, a

Delaware corporation, doing business in the State of Wisconsin pursuant to the laws thereof. The said judgment of the Supreme Court of the State of Wisconsin reversed a judgment of the Circuit Court for Dane County, Wisconsin, confirming an assessment of said taxes against said J. C. Penney Company, a corporation, as affirmed by a decision and order of the Wisconsin Tax Commission, dated July 21, 1938 (R. 77).

The taxes involved, in the sum of \$23,586.79, were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin. A copy of said Section 3 of Chapter 505, Laws of Wisconsin of 1935, effective upon its publication on September 26, 1935, and as amended by Chapter 552, Laws of Wisconsin of 1935, effective upon publication thereof on October 8, 1935, is printed as an Appendix to this petition.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half per centum of the amount of" dividends declared and paid, after the passage thereof and prior to July 1, 1937, out of income derived from property located and business transacted in Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In subsection (4) thereof it is specifically provided that as to corporations doing business within and without the State of Wisconsin the tax shall apply only to dividends declared and paid out of income derived from business transacted and property located in Wisconsin and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner

as is provided in Chapter 71 of the Wisconsin Statutes, the general Income Tax Law of the State of Wisconsin, for the determination of the income of such type of corporations allocable as Wisconsin income.

The facts involved and upon which the Supreme Court of the State of Wisconsin based its decision and judgment are not in dispute and are set forth in the majority opinion (R. 78).

The J. C. Penny Company is a Delaware corporation, having its statutory office at Wilmington, Delaware (R. 26). It is engaged in the business of operating a nationwide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 27). During the year 1934 it operated 47 stores in Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28). During the year 1934, the corporation had a total net income computed on the Wisconsin tax basis of \$16,022,607, and in 1935, a total net income of \$15,223,478. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes (1935)) \$562,331. of the 1934 income was allocable to Wisconsin business and \$587,000. of the 1935 income was allocable to Wisconsin business (R. 46).

On December 31, 1935, the J. C. Penny Company declared a dividend of \$2.25 per share, making total dividend payments of \$5,555,214.00 (R. 45).

In 1936, it declared and paid the following dividends (R. 45):

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36.	\$.75	\$1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

4

The J. C. Penney Company operates its business in the following manner: the total proceeds from sales of goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made by the local store managers for payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the corporation. No separate account is kept of the funds from the various States and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are also drawn thereon in payment for all merchandise purchased and shipped to the various stores (R. 29). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that State. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings (R. 30). The actual payment of dividends is effected by checks drawn upon the accounts of the corporation in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 32). As of the date of payment of the December 31, 1935 dividend 391

stockholders were residents of the State of Wisconsin as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 405 Wisconsin stockholders as against a total of 13,281 stockholders. (R. 51)

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said J. C. Penney Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$23,586.79 (R. 43 and 49). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 51). Thereupon the matter was heard by the Wisconsin Tax Commission and on July 21, 1938 it entered a decision and order sustaining the assessment of said taxes in the amount of \$23,586.79 (R. 19).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation and pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 69). Upon appeal therefrom by the J. C. Penney Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said J. C. Penney Company, under the facts as stated, were invalid as depriving the said J. C. Penney

Company, a corporation, of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States (R. 77). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here sought to be reviewed.

The record upon which this petition is here presented is composed of the printed case as used in the Supreme Court of the State of Wisconsin, being pages numbered 1 to 71 of the Record as certified to this Court, together with the opinion of the Supreme Court of the State of Wisconsin and the proceedings therein, comprising pages numbered 72 to 93 of the Record as certified to this Court.

B.

Reasons Relied On for the Allowance of the Writ.

1. The question presented is the constitutionality of the Wisconsin tax statute, Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to the J. C. Penney Company, a Delaware corporation doing business in Wisconsin, under the facts as previously stated, and of the taxes of \$23,586.79 assessed against said corporation pursuant to said taxing act. The facts relating thereto are not in dispute and are contained in the record made before the Wisconsin Tax Commission. No issue as to the facts was raised or presented in the state courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessment in the court proceedings. Consequently, a discussion of those procedural matters is not relevant to the purposes of this petition. The only controversy at issue involved in the proceedings in the state courts and presented to and decided by the Supreme Court of Wisconsin in rendering the judgment sought to be reviewed, is whether

the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax as provided in Section 3 of Chapter 505, Laws of 1935, (as amended) upon the J. C. Penney Company, a foreign corporation, under the facts set out in the record. This is solely a question of law and purely a Federal question. The judgment of the Supreme Court of Wisconsin sought to be reviewed is based solely on its decision upon that question. The petitioners contend that its decision upon said Federal question is erroneous and should be reversed.

2. Following notice of the assessment of the taxes involved and upon appropriate request therefor by the J. C. Penney Company, a hearing in respect to said assessment was had and conducted by the Wisconsin Tax Commission, which by order, dated July 21, 1938, sustained the assessment. Thereupon, pursuant to the statutes of Wisconsin providing therefor, the J. C. Penney Company appealed from the decision of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin, and the Supreme Court of Wisconsin, successively. In the application for hearing before the Wisconsin Tax Commission (R. 51), and in the notice of appeal from the order of the Wisconsin Tax Commission to the Circuit Court for Dane County, Wisconsin (R. 2), the claim was made by the J. C. Penney Company that Section 3 of Chapter 505, Laws of Wisconsin of 1935 (as amended) as applied to it under the existent facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin, and therefore is invalid as violative of the due process provision of the Fourteenth Amendment to the Constitution of the United States. The same claim was made on the appeal to the Supreme Court of Wisconsin, and its decision sustaining said claim of the J. C. Penney Company the petitioners contend is erroneous and should be reversed.

3. The Wisconsin Tax Commission held that it was without authority to pass upon the constitutional question involved (R. 20) and the Circuit Court for Dane County, Wisconsin decided it adversely to the corporation (R. 67), upon the authority of the decision of the Supreme Court of Wisconsin upon the question, rendered in 1936 in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. In the cited case the Supreme Court of Wisconsin in an action for declaratory judgment had expressly declared Section 3 of Chapter 505, Laws of 1935 (as amended) to be constitutional as imposing a tax within the taxing jurisdiction of the State of Wisconsin as applied to both foreign and domestic corporations, over objection that it violated the due process provision of the Fourteenth Amendment to the United States Constitution. Upon appeal by the J. C. Penney Company to the Supreme Court of Wisconsin from the judgment of the Circuit Court for Dane County, Wisconsin, confirming the order of the Wisconsin Tax Commission and the taxes as there sustained, the corporation renewed its objection that as applied to it Section 3 of Chapter 505, Laws of 1935 (as amended) and the taxes assessed pursuant thereto were violative of the due process provision of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Wisconsin sustained that objection and overruled its prior decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, insofar as that prior decision held that said law imposed a valid tax as applied to foreign corporations doing business in Wisconsin under facts the same as those existent as to the J. C. Penney Company (R. 77). The petitioners contend that this decision upon the Federal question involved and overruling the prior decision thereon is erroneous and should be reversed.

4. The said decision of the Supreme Court of Wisconsin to the effect that Section 3 of Chapter 505, Laws of 1935 (as amended) was invalid as applied to foreign corporations was based squarely upon the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, which was decided by this Court subsequently to the decision in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Comm.*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. Upon the basis of the facts existing in the instant case the Supreme Court of Wisconsin held that the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 was controlling and required it to overrule its prior decision upon the question and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), as applied to a foreign corporation doing business in Wisconsin in the manner of the J. C. Penney Company, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin. It is the contention of the petitioners that the Supreme Court of Wisconsin erred in so construing and applying the decision of this Court in that case and that said decision is neither controlling nor applicable to the question here involved.

5. The petitioners, moreover, contend that no other decision of this Court holds that a tax such as that provided by Section 3 of Chapter 505, Laws of 1935 (as amended) as applied to foreign corporations doing business in the taxing State under and pursuant to the laws thereof, is contrary to the Fourteenth Amendment to the United States Constitution, and that no decision of this Court requires such a holding or sustains the decision of the Supreme Court of Wisconsin to that effect.

6. The petitioners further contend that although the precise question involved has not been passed upon by this

Court, the decision of the Supreme Court of Wisconsin that Section 3 of Chapter 505, Laws of 1935, (as amended) as applied to foreign corporations doing business in Wisconsin, is invalid as contravening the due process clause of the Fourteenth Amendment to the United States Constitution, is not in accord with applicable decisions of this Court and assign the same as error for which said decision should be reviewed and reversed.

Wherefore, Your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Wisconsin, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 96, August Term, 1939, *J. C. Penney Company, a foreign corporation, Appellant v. Wisconsin Tax Commission, Respondent*, and that the said judgment of the Supreme Court of Wisconsin may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE STATE OF WISCONSIN, and

ELMER E. BARLOW,

*As Commissioner of Taxation
of the State of Wisconsin,*

By JOHN E. MARTIN,

Attorney General of Wisconsin,

JAMES WARD RECTOR,

Deputy Attorney General of Wisconsin,

HAROLD H. PERSONS,

Assistant Attorney General of Wisconsin,

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 892

**STATE OF WISCONSIN, AND ELMER E. BARLOW, AS
COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,**
Petitioners,
vs.

J. C. PENNEY COMPANY, A DELAWARE CORPORATION.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

The Opinions of the Court Below.

The opinion and dissenting opinion in the Supreme Court of Wisconsin, filed January 16, 1940, are reported in 289 N. W. 677, but are not as yet reported in the official State reports (R. 77).

II.

Jurisdiction.

1. This petition is filed pursuant to Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)) which provides:

“(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution*, treaties, or laws of the United States; or *where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution*, or any treaty or statute of, or commission held or authority exercised under, the *United States*; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (Emphasis ours.)

2. Petitioners also rely on Rule 38 of the Rules of this Court and particularly on Paragraph 5 thereof which provides in part:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered.

"(a) Where a State court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

3. The date of the judgment to be reviewed is January 16, 1940 (R. 77).

In its application for a hearing before the Wisconsin Tax Commission upon the assessment involved (R. 51) and in its pleadings upon the statutory appeal to the circuit court for Dane County, Wisconsin from the decision of the Wisconsin Tax Commission confirming the assessment (R. 2), the J. C. Penney Company, among other things, claimed immunity from the tax upon the ground that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), in so far as it imposed a tax upon the Company was contrary to the Fourteenth Amendment to the United States Constitution because it taxed beyond the taxing jurisdiction of the State of Wisconsin and thus deprived the J. C. Penney Company of its property without due process.

The Circuit Court for Dane County, Wisconsin upheld the validity of the tax in question as applied to the J. C. Penney Company upon the authority of *State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over objection that it contravened the due process provisions of the Fourteenth Amendment to the Constitution of the United States (R. 67, 68).

The Supreme Court of Wisconsin, upon appeal from the Circuit Court, sustained the contention of the J. C. Penney Company and held that the said Section 3 of Chapter 505 (as amended), was invalid in so far as it purported to impose a tax upon the devolution of dividends of the J. C. Penney Company to its stockholders. The court thus expressly overruled its decision in the case of *State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission* (1936), 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so specifically upon the authority of *Connecticut*

General Life Ins. Co. v. Johnson (1938), 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (R. 77).

Thus, a statute of the State of Wisconsin was held to be invalid upon the basis of an asserted conflict with the Fourteenth Amendment to the United States Constitution as interpreted by this Court.

The cases upon which petitioner relies in support of jurisdiction are:

Blodgett v. Silberman (1928), 277 U. S. 1, 72 L. Ed. 749, 48 S. Ct. 410;

Boynnton v. Hutchinson Gas Co. (1934), 291 U. S. 656, 78 L. Ed. 1049, 54 S. Ct. 528;

Kelly v. Washington ex rel. Foss Company (1937), 302 U. S. 1, 82 L. Ed. 3, 58 S. Ct. 87;

Coleman v. Miller (1939), 307 U. S. 433, 83 L. Ed. 1385, 59 S. Ct. 972.

III.

Statement of the Case.

The controversy at issue arose out of an assessment of taxes in the amount of \$23,586.79, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), against the J. C. Penney Company, a Delaware corporation, doing business in the State of Wisconsin under and pursuant to the laws of Wisconsin. A copy of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), may be found in the Appendix herein. In substance, it imposes a tax on all corporations, foreign and local, equal to $2\frac{1}{2}\%$ of the amount of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. The corporation declaring the dividend is made liable for the tax and required to deduct the same from the dividend.

The J. C. Penney Company, a Delaware corporation, requested a hearing upon the assessment before the Wisconsin Tax Commission (R. 51). The Wisconsin Tax Commission confirmed the assessment (R. 19). The J. C. Penney Company appealed to the Circuit Court for Dane County, Wisconsin, and, as appears from the record on said appeal (R. 2), it alleged that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) so far as it imposed the tax upon the J. C. Penney Company, was in conflict with the Fourteenth Amendment to the United States Constitution because it imposed a tax beyond the state's jurisdiction to tax, and thereby deprived the company of its property without due process of law.

The circuit court for Dane County rejected the Company's claim of immunity from the tax, and confirmed the assessment (R. 67).

Upon appeal from the judgment of the circuit court the Wisconsin Supreme Court reversed the judgment of the circuit court and upheld the Company's claim to immunity from the tax. Thus, the court held that, in so far as the said Section 3 of Chapter 505 (as amended), imposed a tax upon the devolution of dividends from the J. C. Penney Company to its stockholders paid out of income earned in Wisconsin, it was contrary to the Fourteenth Amendment to the United States Constitution (R. 77). While other issues were raised in the case none was decided except the constitutional question to which reference has been made.

The facts upon which the Wisconsin Supreme Court predicated the immunity of the J. C. Penney Company from the tax imposed by the said Section 37, Chapter 505, are set out as follows in the court's opinion:

"The plaintiff operates its business in the following manner: the total proceeds from sales of goods in all its stores, including Wisconsin stores, are de-

posited in local banks. From such deposits payments are made,—payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the Company. No separate account is kept of the funds from the various states and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are drawn in payment for all merchandise purchased and shipped to the various stores. All of the stockbooks, minute books and secretary's records of the Company are kept in the state of New York, except that a duplicate stock ledger is kept in Delaware as required by that state. All transfers of shares of stock are made by the New York transfer agent of the Company; all directors' and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings. The actual payment of dividends is effected by checks drawn upon the accounts of the plaintiff Company in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the state of Wisconsin and no act in connection with the receipt of such dividend was performed in the state of Wisconsin except that certain stockholders of the Company received their mail in this state. * * * (R. 78-79).

IV.

Specification of Errors.

1. The Supreme Court of Wisconsin erred in holding that Section 3 of Chapter 505, Laws of Wisconsin, 1935,

(as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the J. C. Penney Company, under the existing facts, imposed a tax beyond the taxing jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935), against the J. C. Penney Company, a corporation, under the existing facts constitutes a deprivation of property of the J. C. Penney Company without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

V.

ARGUMENT.

Summary of Argument.

POINT A. The Supreme Court of Wisconsin erroneously predicated its decision on the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) and the tax thereby imposed upon the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436.

POINT B. This Court has announced no decision construing the Fourteenth Amendment condemning the application of state tax laws such as Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) to foreign corporations doing business in the State in the manner of the J. C. Penney Company.

POINT C. On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended) as applied to the J. C. Penney Company in the present case.

Point A.

The Supreme Court of Wisconsin erroneously predicated the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), upon the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (1938).

The inapplicability of the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, to the facts of the present case were so clearly pointed out in the dissenting opinion of Mr. Justice Fowler that we rest our argument of this point upon the language of his dissent. In referring to the differences in the two cases he said:

“ * * * The object of the California tax was the reinsurance premium received and contracted for in the State of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the State of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. The reason not applying, neither does the rule. So at least it seems to me. Under this

concept, the statute here involved remains valid unless subsequently declared invalid by the Supreme Court of the United States."

Point B.

This Court has announced no decision construing the Fourteenth Amendment condemning the application of State tax laws, such as Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), to foreign corporations doing business in the State in the manner of the J. C. Penney Company.

It would, of course, be impossible, particularly within the limits of the argument here permitted, to analyze each of the decisions rendered by the United States Supreme Court construing the taxing power of the States and to show that none of such decisions condemns a tax such as is involved in this case. It should be sufficient to point out that prior to the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, the Supreme Court of Wisconsin had expressly held in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, that Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), was a tax on the devolution of income derived from business transacted within the State and sustained the validity thereof, as applied to foreign corporations over the specific objection that it violated the due process provision of the Fourteenth Amendment. The Supreme Court of Wisconsin in the instant case overruled its prior decision in that case as applied to the *J. C. Penney Company*, a foreign corporation, solely upon the basis that the decision of this Court in the case of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, compelled and required it to do so. Thus, the only case

decided by this Court which has been thought to require the invalidation of Section 3 of Chapter 505, and the tax assessed thereunder is, as we have pointed out above, clearly distinguishable and inapplicable, and it is neither decisive of nor controlling on the question here presented. It is, of course, conceded by all parties involved in the present controversy that there has been no decision by this Court dealing with a State tax of the precise nature involved.

Point C.

On the contrary, applicable decisions of this Court sustain the validity of said Section 3 of Chapter 505, Laws of 1935 (as amended), as applied to the J. C. Penney Company in the present case.

It was settled by this Court in the case of *Shaffer v. Carter*, (1920), 252 U. S. 37, 64 L. Ed. 445, 40 S. Ct. 221, that a State may impose a tax upon income derived from the transaction of business within its territorial jurisdiction. Thus it must be conceded that the State of Wisconsin has jurisdiction to tax the income of foreign corporations to the extent that such income is derived from business transacted within its territorial jurisdiction. In *State ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the tax in question was held to be a tax on the devolution of income derived from business transacted in the State.

Had the tax in question been expressly denominated an income tax upon the Wisconsin income of the J. C. Penney Company, measured by a percentage of dividends declared out of that income and collectible at the time of declaring such dividends, there could hardly be a doubt but that the rule of *Shaffer v. Carter*, (1920) 252 U. S. 37, 64 L. Ed. 445, 40 S. Ct. 221, would apply.

The fact that the tax is not specifically so denominated is not important in this case. In the ultimate analysis, when a question is raised as to the taxing power of the State under the Federal Constitution, the question is resolved not upon the basis of definitions but rather upon the basis of the substance and operation of the tax imposed. The State has constitutional power to impose a tax upon the transaction of corporate business within its boundaries, and a tax which has the effect of taxing such business is within its power, irrespective of the particular form which it may take or of the particular label with which it may be designated. *Underwood Typewriter Co. v. Chamberlain*, (1920) 254 U. S. 113, 65 L. Ed. 165, 41 S. Ct. 45. Exactions imposed upon the transaction of corporate business assume many forms. Two such forms selected at random are those involved in *Atlantic Lumber Co. v. Commissioner of Corporations and Taxation*, (1936) 298 U. S. 553, 80 L. Ed. 1328, 56 S. Ct. 887; *American Manufacturing Co. v. St. Louis*, (1929) 250 U. S. 459, 63 L. Ed. 1084, 39 S. Ct. 522. There are, of course, many others.

The Wisconsin Supreme Court in the case of *State ex rel. Froedtert G. & M. Co. v. Tax Commission*, (1936) 221 Wis. 225, (1936) 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, rests the authority to impose the tax exacted by Section 3 of Chapter 505 upon the power to tax the transaction of corporate business in the State of Wisconsin. Thus, the court said that the earning of the income subjected to taxation through the transaction of Wisconsin business was the essential foundation of the tax itself.

So regarded, the tax is, in substance, laid upon corporations doing business in the State of Wisconsin and measured by a percentage of dividends declared out of income so derived.

In its opinion in *State ex rel. Froedtert G. & M. Co. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267

N. W. 52, 104 A. L. R. 1478, the Wisconsin Supreme Court cited the case of *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544, as sustaining the view that the tax imposed by Section 3 of Chapter 505 was laid upon the corporation. That case is without any question authority for the proposition to which it was cited by the Wisconsin Supreme Court. And it involved a tax law identical in all essential respects. In the subsequent cases of *United States v. Railroad Company*, (1873) 17 Wall. (84 U. S.) 322, 21 L. Ed. 597, and *Stockdale v. Atlantic Insurance Co.*, (1874) 20 Wall. (87 U. S.) 323, the United States Supreme Court questioned its interpretation of the tax involved in *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544, but in *Railroad Company v. Collector*, (1879) X Otto (100 U. S.) 595, 25 L. Ed. 647, the court laid the issue at rest by returning to its position in the case of *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544.

The fact that the tax imposed upon the distribution of dividends by Section 3 of Chapter 505 is required to be deducted from the dividends paid does not alter its character as a tax upon the corporation for the transaction of business. The same situation existed in *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. Ed. 544.

If it be assumed, however, that the exaction imposed by Section 3 of Chapter 505 is laid upon stockholders of corporations for the privilege of transacting business in the State of Wisconsin in the corporate form, there is no reason why that brings it into conflict with the Fourteenth Amendment to the United States Constitution. The stockholders of corporations who do business in the corporate form in the State of Wisconsin enjoy valuable privileges under the law of Wisconsin. And they enjoy the protection

of Wisconsin law in acquiring income which they may distribute among themselves in the form of corporate dividends. Certainly, it is not inequitable to require such stockholders to compensate the State for the privileges which they may thus enjoy.

In *Miller v. Milwaukee*, (1927) 272 U. S. 713, 71 L. Ed. 487, 47 S. Ct. 280, it was held that the State of Wisconsin could not tax Wisconsin residents upon income received as dividends from a corporation which derived the income almost exclusively from tax exempt securities. Thus, the corporate veil was pierced and it was recognized that the stockholders were being taxed upon the income of tax exempt securities. If the corporate veil can be so pierced, we respectfully submit that it can be pierced to impose the tax here in question. If it can be recognized in the face of important considerations of public policy that the income of a corporation is, in effect, the income of its stockholders, then the stockholders of foreign corporations may be rightfully required to pay a tax which is based upon income received by them in the form of corporate dividends derived from corporate business transacted in the State of Wisconsin.

Courts frequently pierce the corporate veil, and we must consequently assume that the Fourteenth Amendment contains no prohibition against piercing it. A legislative body may likewise look at reality in the formulation of a tax policy which is in all respects just and equitable.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers and that to such end a writ of certiorari should be

granted and this Court should review the decision of the Supreme Court of Wisconsin and finally reverse it.

JOHN E. MARTIN,

Attorney General of Wisconsin,

JAMES WARD RECTOR,

Deputy Attorney General of Wisconsin,

HAROLD H. PERSONS,

Assistant Attorney General of Wisconsin,

Counsel for Petitioners.

APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective on Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

- Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and

undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipt of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury.

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1940

No. 46, 47 and 48

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners.

J. C. PENNEY COMPANY, a Delaware Corporation,

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners.

F. W. WOOLWORTH COMPANY, a New York Corporation, (No. 47)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners.

MINNESOTA MINING AND MANUFACTURING COM-
PANY, a Delaware Corporation, (No. 48)

BRIEF OF PETITIONERS

JOHN E. HARTIN
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Point A: IN STATE EX REL FROEDTERT
G. & M. CO., INC. v. TAX COMMISSION,
(1936) 221 WIS. 225, 265 N. W. 672, 267 N. W.
52, 104 A. L. R. 1478, THE SUPREME COURT
OF WISCONSIN CONSTRUED SECTION 3
OF CHAPTER 505, LAWS OF WISCONSIN,
1935, AS AMENDED, AS IMPOSING A TAX
UPON THE DEVOLUTION OR TRANSFER
OF DIVIDENDS DERIVED FROM THE IN-
COME OF CORPORATIONS ARISING OUT
OF CORPORATE BUSINESS TRANSACTED

IN THIS STATE OR CORPORATE PROPERTY LOCATED IN THIS STATE. THE CONSTITUTIONALITY OF THE TAX WAS UPHELD AS APPLIED TO DOMESTIC AND FOREIGN CORPORATIONS AGAINST THE OBJECTION THAT IT CONTRAVENED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT ATTEMPTED TO IMPOSE A TAX BEYOND THE TAXING JURISDICTION OF THE STATE22-26

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In the Supreme Court of the United States

OCTOBER TERM, 1940

Nos. 46, 47 and 48

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation. (No. 46)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

F. W. WOOLWORTH COMPANY, a New York Corporation. (No. 47)

STATE OF WISCONSIN and ELMER E. BARLOW, as
Commissioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

MINNESOTA MINING AND MANUFACTURING COM-
PANY, a Delaware Corporation. (No. 48)

BRIEF OF PETITIONERS

The petitioners are the same in the above entitled cases and this brief is submitted on their behalf as a joint brief for all three cases.

Although the detailed facts are different in each case by virtue of there being separate respondents and the conduct by each of its respective individual business and affairs, the same ultimate factual situation exists in all of them. The differences in detailed facts are not material

here. The Supreme Court of Wisconsin heard and decided the cases at the same time and upon the same grounds, its decision in the *J. C. Penney Company* case, number 46 here, expressly controlling the judgment entered in each of the cases. The questions of law here presented are likewise identical.

The facts relating to each case will be hereinafter separately stated. In all other respects the contents hereof, except as otherwise specifically stated, apply equally to all three cases.

I

THE OPINIONS OF THE COURT BELOW.

The majority and dissenting opinions of the Supreme Court of Wisconsin, filed January 16, 1940, in the three cases are reported respectively in Vol. 233 Wis. (Advance Sheets, No. 3) pp. 286, 305 and 306, and in 289 N. W. 676, 685 and 686 (No. 46, R. 77; No. 47, R. 78; No. 48, R. 95).

II

JURISDICTION.

1. The jurisdiction of this Court is invoked under the provisions of Section 237b of the Federal Judicial Code (28 U. S. C. A. 344 (b)), and petitioners rely upon Paragraph 5 (a) of Rule 38 of the Rules of this Court.

2. The writs of certiorari in these cases were issued to review the separate judgments of the Supreme Court of Wisconsin in the three cases. The judgment of the Supreme Court of Wisconsin was entered in each case

on January 16, 1940 (No. 46, R. 76; No. 47, R. 77; No. 48, R. 94).

3. Review is here sought by the writs of certiorari in these cases of three separate judgments entered by the Supreme Court of the State of Wisconsin upon appeals to it in three separate proceedings in the state courts of Wisconsin respecting the validity of taxes assessed by the State of Wisconsin against the respective respondents separately. The respondent in each case contends and in its pleading throughout the proceedings has averred that insofar as Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935, imposes a tax upon the respondent under the facts set out in the record, said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, imposes a tax beyond the taxing jurisdiction of the State of Wisconsin, and that, therefore, the imposition of the tax against the respondent by the assessment involved, which was made pursuant to the provisions of said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, constitutes a deprivation of the respondent's property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States. Separate judgments in the state courts of Wisconsin affirming the taxes assessed by the State of Wisconsin, pursuant to said Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, against the respective respondents were reversed on separate appeals by the Supreme Court of Wisconsin on the constitutional objections thus asserted by the respondents. It is these

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judgments of the Supreme Court of Wisconsin that are here under review.

4. Reference is also made to the separate petitions for and briefs in support of the granting of the writs of certiorari in these cases, for a more comprehensive jurisdictional statement.

5. The briefs in opposition to the granting of the writs in two of these cases urged that there is no indication in the decision of the Supreme Court of Wisconsin that it was rested on a federal question. Such position is wholly untenable in view of the fact that the Supreme Court of Wisconsin specifically rested its decision upon the federal question. Attention is directed to the statement in the opinion (No. 46, B. 77, 86), reported *J. C. Penny Company v. Tax Commission*; (1940) 233 Wis. (adv. sheets) 286, 297, 289 N. W. 677, 682, as follows:

" * * * While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. * * *

"We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States." (Emphasis supplied)

III.

STATEMENT OF THE CASE.

The controversy in these cases is as to the validity of taxes assessed by the State of Wisconsin against the respective respondent foreign corporations, doing business in the State of Wisconsin pursuant to the laws thereof. The taxes involved were assessed pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, which imposes a tax upon corporate dividends paid out of income derived from property located or business transacted in the State of Wisconsin. A copy of said Section 3 of Chapter 505, Laws of Wisconsin, 1935 (effective upon its publication on September 26, 1935) and as amended by Chapter 552, Laws of Wisconsin, 1935 (effective upon its publication on October 8, 1935) is printed as an Appendix to this brief.

Said taxing statute is a special act and imposes a tax on "all corporations (foreign and local)" "equal to two and one-half per centum of the amount" of dividends declared and paid out of income derived from property located and business transacted in the State of Wisconsin. It provides that such tax shall be deducted and withheld by the corporation from the dividends paid to both residents and nonresidents of Wisconsin and that the corporation is made liable for the tax and the payment thereof.

In Subsection (4) thereof it is specifically provided that as to "corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state

of Wisconsin" and that the amount of income of such a corporation attributable to the State of Wisconsin shall be computed in the same manner as is provided in Chapter 71 of the Wisconsin Statutes (the general income tax law) for the determination of the income of such type of corporation allocable as Wisconsin income.

The detailed facts in each case are not in dispute and are contained in separate records certified to this Court. No issue as to the facts was raised or presented in the cases in the state courts of Wisconsin and none now exists or is here presented. Likewise, no question has been raised, and none exists, as to the correctness of the procedure in the assessment of the taxes involved or in the review of the assessments in the state court proceedings. Consequently, no procedural matters are involved herein. The only controversy at issue involved in the proceedings in the state courts and presented to and decided by the Supreme Court of Wisconsin in rendering the judgments under review is whether the Fourteenth Amendment to the Constitution of the United States precludes the State of Wisconsin from imposing the tax, as provided in Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the respective respondent foreign corporations under the facts set out in the records. This is solely a question of law and purely a federal question. The judgments of the Supreme Court of Wisconsin under review are based solely on its decision of that question. The petitioners here contend that its decision upon said federal question is erroneous and should be reversed.

Separate assessment of the taxes involved in each case was made against each respondent (No. 46, R. 43, 49; No. 47, R. 50-52; No. 48, R. 46). Each respondent

duly filed its objections to said assessment and duly applied for a hearing thereon in the manner and as provided by the Wisconsin statutes (No. 46, R. 51; No. 47, R. 53-54; No. 48, R. 48). Each respondent herein made the claim that Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to it under the existing facts purports to impose a tax beyond the taxing jurisdiction of the State of Wisconsin and, therefore, is invalid as violative of the due process provision of the Fourteenth Amendment to the Constitution of the United States. The matters were heard separately by the Wisconsin Tax Commission and it entered a separate decision and order sustaining the assessment in each case (No. 46, R. 19; No. 47, R. 22; No. 48, R. 28). Separate appeals therefrom, in accordance with and as provided by the Wisconsin statutes, were taken to the Circuit Court for Dane County, Wisconsin, by each of the respondents, and in the pleadings upon such statutory appeals each respondent renewed its objection to the tax upon said constitutional grounds.

The Circuit Court for Dane County, Wisconsin, upheld the validity of the tax in each case upon the authority of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, in which case the Supreme Court of the State of Wisconsin in a declaratory judgment in 1936 had expressly sustained the validity of said tax law as applied to both foreign and domestic corporations over the objection that it contravened the due process of law provisions of the Fourteenth Amendment to the Constitution of the United States (No. 46, R. 67; No. 47, R. 67; No. 48, R. 83), and entered separate judgments on June

10, 1939 in each case sustaining the assessment there involved (No. 46, R. 69; No. 47, R. 68; No. 48, R. 85).

(Upon separate appeals from said Circuit Court of Dane County, Wisconsin, by the respective respondents the Supreme Court of Wisconsin sustained the contention of the respondents and held that Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, was invalid insofar as it purported to impose a tax upon the devolution of dividends of the respondent corporations to their respective stockholders. The Supreme Court of the State of Wisconsin expressly overruled its decision in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, and did so expressly upon the authority of *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436 (No. 46, R. 77; No. 47, R. 78; No. 48, R. 95). It is these decisions and judgments of the Supreme Court of the State of Wisconsin that are here under review.

IV.

SUMMARY OF FACTS.

As before stated, the detailed facts in each case are not in dispute and are contained in the separate records certified to this Court and printed separately for each case. Following are separate summaries of such facts in each case as are material to the questions here involved. The page references to the record contained in each summary are to the page of the printed record in the particular case to which the summary is applicable.

1: No. 46, *J. C. Penney Company Case*

The J. C. Penney Company is a Delaware corporation, having its statutory office at Wilmington, Delaware (R. 26). It is engaged in the business of operating a nation wide chain of retail department stores, approximately 1500 in number. It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 27). During the year 1934 it operated 47 stores in Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28). During the year 1934, the corporation had a total net income computed on the Wisconsin tax basis of \$16,022,607, and in 1935, a total net income of \$15,223,478. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes (1935)) \$562,331.00 of the 1934 income was allocable to Wisconsin business and \$587,000.00 of the 1935 income was allocable to Wisconsin business (R. 46).

On December 31, 1935, the J. C. Penney Company declared a dividend of \$2.25 per share, making total dividend payments of \$5,555,214.00 (R. 45).

In 1936, it declared and paid the following dividends (R. 45):

Date Paid	Amount per share	Total Amount Paid to Stockholders
3/31/36	\$.75	\$ 1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

The J. C. Penney Company operates its business in the following manner: the total proceeds from sales of

goods in all its stores, including Wisconsin stores, are deposited in local banks. From such deposits payments are made by the local store managers for payrolls, rents, advertising and other local expenses. The remainder not needed for such expenses is ultimately transferred to the treasurer's office in New York City and deposited in New York banks to the credit of the corporation. No separate account is kept of the funds from the various States and moneys after leaving the local banks completely lose their identity with respect to being derived from a particular source. From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid. Checks are also drawn thereon in payment for all merchandise purchased and shipped to the various stores (R. 29). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York, except that a duplicate stock ledger is kept in Delaware as required by that State. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York and all dividends are declared at such meetings (R. 30). The actual payment of dividends is effected by checks drawn upon the accounts of the corporation in New York, payable to the stockholders of record upon each dividend record date. Such checks are mailed to the postoffice address of each stockholder as the same appears in the record. No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received

their mail in Wisconsin (R. 32). As of the date of payment of the December 31, 1935 dividend, 391 stockholders were residents of the State of Wisconsin as against a total of 12,385 stockholders. With respect to the dividend paid on December 15, 1936, there were 405 Wisconsin stockholders as against a total of 13,281 stockholders (R. 51).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax Commission assessed a tax against the said J. C. Penney Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$23,586.79 (R. 43 and 49). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 51). Thereupon the matter was heard by the Wisconsin Tax Commission and on July 21, 1938 it entered a decision and order sustaining the assessment of said taxes in the amount of \$23,586.79 (R. 19).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation and pursuant to the provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 69). Upon appeal therefrom by the J. C. Penney Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its

decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said J. C. Penney Company, under the facts as stated, were invalid as depriving the said J. C. Penney Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States (R. 77). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is under review in this case.

2. *No. 47, F. W. Woolworth Company Case*

The F. W. Woolworth Company is a New York corporation, having its statutory office at Watertown, New York, and its principal business office in the Woolworth Building, New York City, New York. During the years involved it was engaged in the business of operating a chain of retail mercantile stores in 29 States, the District of Columbia and Cuba, and owns all or a part of the stock in other corporations engaged in the same business in the other 19 States, Canada, Great Britain and Germany (R. 44). It is licensed to do business in the State of Wisconsin but has no executive office of any kind located within the State (R. 4). During the years 1934, 1935 and 1936 it operated about 55 stores in Wisconsin (R. 39). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1934 of \$27,808,579.19, in 1935 a total net income of \$24,606,991.08, and in 1936 a total net income of \$25,102,593.64 (R. 4). Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) \$555,538.44

of the 1934 net income was allocable to Wisconsin business, \$579,547.66 of the 1935 net income was allocable to Wisconsin business, and \$576,522.38 of the 1936 net income was allocable to Wisconsin business (R. 4).

On each of the following dates, to-wit: December 2, 1935, March 2, 1936, June 1, 1936, September 1, 1936, December 1, 1936, and March 1, 1937 the F. W. Woolworth Company declared a dividend on all its outstanding stock, and on each of said dates paid a total dividend of \$5,850,000. Of each of said dividends \$5,822,167.80 was paid on shares outstanding in the hands of stockholders, and the balance of \$27,832.20 of each dividend was paid upon shares outstanding but held in the Company's treasury (R. 5). Each of these dividends was declared by the board of directors at meetings held in New York City, New York (R. 34).

The F. W. Woolworth Company operates its business in the following manner: from the proceeds from sales of goods in each store, including Wisconsin stores, the local manager pays the local expenses such as payrolls and small supplies. He deposits the balance above these requirements in a local bank. Periodically the Minneapolis district office draws on this bank account and when so drawn the moneys are combined at the Minneapolis office with moneys similarly drawn from banks from other States in the Minneapolis district. No attempt is made to keep the money separate from the different States. The Minneapolis office uses the moneys so received to pay merchandise bills, alteration, and other expenses (R. 35). A separate accounting for each store is kept at the Minneapolis office (R. 41). From time to time the district office accumulates funds above these re-

quirements which are transmitted to the main office in New York City and deposited in New York banks to the credit of the corporation (R. 35). From the funds deposited in New York, salaries, general overhead expenses in New York and other offices, taxes and dividends are paid (R. 36). All of the stockbooks, minute books and secretary's records of the corporation are kept in the State of New York. All transfers of shares of stock are made by the New York transfer agent of the corporation; all directors and stockholders' meetings are held in the State of New York (R. 36). All dividends are declared at such meetings (R. 34). The actual payment of dividends is effected by a check drawn upon the bank account of the corporation in New York, payable to its transfer agent, City Bank Farmers Trust Co. of New York City for the total amount of each dividend declared. The transfer agent then prepares checks payable to each stockholder of record which it mails in New York City to the postoffice address of each stockholder as the same appears in the record (R. 34). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 34). As of the said dividend date there were in excess of 50,000 stockholders of the company owning 9,703,613 shares of which not more than 470 were residents of the State of Wisconsin owning not more than 14,597 shares (R. 7).

Pursuant to a notice of an additional assessment dated July 16, 1937, in accordance with the procedural provisions of the Wisconsin statutes, the Wisconsin Tax

Commission assessed a tax against the said F. W. Woolworth Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$20,058.33 (R. 50-52). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 53, 54). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938, it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of \$20,058.33, exclusive of interest and penalties (R. 26).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the provisions thereof in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939, judgment was entered therein confirming the same (R. 68). Upon appeal therefrom by the F. W. Woolworth Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940, rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said F. W. Woolworth Company, under the facts as stated, were invalid as depriving the said F. W. Woolworth Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the

Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission*, on the same date (R. 78). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here under review.

3. No. 48, *Minnesota Mining and Manufacturing Company Case*

The Minnesota Mining and Manufacturing Company is a Delaware corporation, having its statutory office at Wilmington, Delaware, and its principal business office in St. Paul, Minnesota (R. 5). During the years involved it was engaged in the manufacturing business, operated factories at Detroit, Michigan, Copley, Ohio, St. Paul, Minnesota and also a factory at Wausau, Wisconsin, manufacturing roofing granules (R. 64). It is qualified to do business in the State of Wisconsin under the laws thereof but has no executive office of any kind located within the State (R. 5). Computed on the Wisconsin tax basis, the corporation had a total net income during the year 1935 of \$1,764,460.30. Applying the formula of the Wisconsin income tax statute (Section 71.02, Wisconsin Statutes 1935) \$261,157.62 of the 1935 net income was allocable to Wisconsin business (R. 48).

The Minnesota Mining and Manufacturing Company paid dividends as follows (R. 48):

No. 1 January 2, 1936	\$ 215,909.83
No. 2 April 1, 1936	216,380.97
No. 3 July 1, 1936	288,278.00
No. 4 October 1, 1936	336,441.00
No. 5 December 22, 1936	624,819.00
Total	\$1,681,828.80

The dividends above shown as paid in April, July, October and December included dividends paid on treasury stock to the aggregate amount of \$1,866.25, but the amount shown above for the dividend paid in January does not include dividends paid on treasury stock on that date in the amount of \$371.25 (R. 67). All of said dividends were declared at meetings of the Board of Directors held in St. Paul, Minnesota (R. 43).

The products of the Wausau plant are shipped to Chicago and points west, and the sales thereof are made through the Company's branch office in Chicago, Illinois. Pricing and billing the customer is done at the St. Paul, Minnesota office. The customer remits directly to the St. Paul office and the proceeds are deposited in banks in St. Paul, Minnesota (R. 64), where they are co-mingled with funds from other factories and income from other sources. The funds in said bank are used to pay expenses, royalties and dividends (R. 65). Employees of the Wausau, Wisconsin plant are paid as follows: After the payroll is prepared and sent to the main office at St. Paul, checks are there drawn on a Wausau bank and sent to the Wausau plant manager for distribution. On the same day a deposit in the amount of the total payroll is sent by the main office to the Wausau bank to meet the payroll checks (R. 65). The method of payment of each of said dividends was that the Company drew one check on its bank account in St. Paul, Minnesota for the full amount of the dividend, including the amount paid on the treasury stock, payable to its transfer agent in St. Paul, Minnesota, which in turn paid the dividends therefrom to the individual stockholders and returned to the corporation the dividends declared and paid on the treasury

stock (R. 68). No act in connection with the payment of dividends was performed within the State of Wisconsin and no act in connection with the receipt of such dividend was performed in the State of Wisconsin except that certain stockholders lived and received their mail in Wisconsin (R. 8). As of January 1, 1936 there were 42 stockholders of the company owning 3,006 shares, who were residents of the State of Wisconsin, and on January 1, 1938 there were 44 stockholders owning 4,944 shares who were residents of the State of Wisconsin. The Company had 961,260 shares of common stock outstanding, which were owned in practically every State in the Union (R. 64).

Pursuant to a notice of an additional assessment dated August 13, 1937, in accordance with the procedural provisions of the Wisconsin Statutes, the Wisconsin Tax Commission assessed a tax against the said Minnesota Mining and Manufacturing Company, a corporation, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, which was ultimately adjusted at the sum of \$5,471.06 (R. 46). The corporation duly filed its objections to said assessment and applied for a hearing thereon within the period, in the manner and as provided by the Wisconsin Statutes in such instances (R. 48). Thereupon the matter was heard by the Wisconsin Tax Commission and on December 19, 1938 it entered a decision and order sustaining the assessment of said taxes, as adjusted in the amount of \$5,471.06, exclusive of interest and penalties (R. 74).

The assessment of said taxes and the decision and order of the Wisconsin Tax Commission sustaining the same, upon the application of the corporation pursuant to the

provisions therefor in the Wisconsin Statutes, were duly reviewed by the Circuit Court for Dane County, Wisconsin, and on June 10, 1939 judgment was entered therein confirming the same (R. 85). Upon appeal therefrom by the Minnesota Mining and Manufacturing Company in accordance with the Wisconsin Statutes, the Supreme Court of the State of Wisconsin on January 16, 1940 rendered its decision and judgment reversing the judgment of said Circuit Court and holding that said taxes so assessed, and the provisions of Section 3 of Chapter 505, Laws of Wisconsin of 1935, as amended, as applied to said Minnesota Mining and Manufacturing Company, under the facts as stated, were invalid as depriving the said Minnesota Mining and Manufacturing Company, a corporation, of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, based upon the opinion filed and the decision of the Supreme Court of Wisconsin in the case of *J. C. Penney Company, a foreign corporation, v. Wisconsin Tax Commission*, on the same date (R. 95). It is this decision and judgment of the Supreme Court of the State of Wisconsin that is here under review.

V.

SPECIFICATION OF ERRORS.

1. The Supreme Court of Wisconsin erred in holding in each case that Section 3 of Chapter 505, Laws of Wisconsin, 1935, (as amended by Chapter 552, Laws of Wisconsin, 1935) as applied to the respective respondents, under the existing facts, imposed a tax beyond the taxing

jurisdiction of the State of Wisconsin and therefore is invalid as in conflict with the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Wisconsin erroneously held in each case that the assessment of the taxes involved, pursuant to the provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended by Chapter 552, Laws of Wisconsin, 1935) against the respective respondents, under the existing facts, constitutes a deprivation of property of the respondents without due process of law because beyond the taxing power of the State of Wisconsin and therefore is invalid as violative of the Fourteenth Amendment to the Constitution of the United States.

VI.

ARGUMENT

POINT A. In *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, the Supreme Court of Wisconsin construed Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing a tax upon the devolution or transfer of dividends derived from the income of corporations arising out of corporate business transacted in this State or corporate property located in this State. The constitutionality of the tax was upheld as applied to domestic and foreign corporations against the objection that it contravened the Fourteenth Amendment to the Constitution of the United States in that it attempted to impose a tax beyond the taxing jurisdiction of the State.

POINT B. The Supreme Court of Wisconsin in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 correctly applied the Fourteenth Amendment to the United States Constitution, as that amendment is construed by this Court, in determining the constitutionality of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended.

POINT C. The Wisconsin Supreme Court in the instant cases, while it adhered to the construction of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, laid down in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. Ed. 673, 58 S. Ct. 436, required that the tax be invalidated as beyond the taxing jurisdiction of the State of Wisconsin under the Fourteenth Amendment to the United States Constitution.

POINT D. The declaration and payment of dividends outside of the State of Wisconsin by a foreign corporation does not itself constitute an event taxable by Wisconsin and the court below properly so held. Where the income distributed is derived from Wisconsin earnings, however, and thus forms the subject matter of the transfer, the State of Wisconsin acquires jurisdiction to tax the transfer.

Point A.

IN STATE EX REL. FROEDTERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. B. 1478, THE SUPREME COURT OF WISCONSIN CONSTRUED SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED, AS IMPOSING A TAX UPON THE DEVOLUTION OR TRANSFER OF DIVIDENDS DERIVED FROM THE INCOME OF CORPORATIONS ARISING OUT OF CORPORATE BUSINESS TRANSACTED IN THIS STATE OR CORPORATE PROPERTY LOCATED IN THIS STATE. THE CONSTITUTIONALITY OF THE TAX WAS UPHELD AS APPLIED TO DOMESTIC AND FOREIGN CORPORATIONS AGAINST THE OBJECTION THAT IT CONTRAVENED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT ATTEMPTED TO IMPOSE A TAX BEYOND THE TAXING JURISDICTION OF THE STATE.

The provisions of Section 3 of Chapter 505, Laws of Wisconsin, 1935 (as amended), the tax law involved in the present controversies, so far as here material, reads as follows:

“Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable

to residents and nonresidents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission."

(A copy of the entire law is printed as an Appendix to this brief.)

Shortly following the enactment thereof an original action was instituted in the Supreme Court of the State of Wisconsin by the Froedtert Grain & Malting Company, Inc. for the purpose of obtaining a declaratory judgment as to the constitutionality of the law. The decision of the Wisconsin Supreme Court in said proceeding is reported in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478. The court upheld the law in its entirety as against the constitutional objections urged, including the objection that the tax imposed thereby was without the taxing jurisdiction of the State and was, therefore, prohibited by the Fourteenth Amendment to the Constitution of the United States.

A motion for rehearing was made and in connection therewith the Court was urged to determine the constitutionality of the law as applied to foreign corporations. The Froedtert Grain & Malting Company was a Wisconsin corporation and there was nothing specifically said in the court's first opinion to indicate whether it considered the law constitutional as applied to foreign corporations. In its opinion on rehearing it was specifically held by the

Court that the law, as applied to foreign corporations, was valid and that it did not impose a tax without the taxing jurisdiction of the State of Wisconsin.

The basis of the holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478, was as follows:

(1) The law imposes a tax upon the devolution or transfer from a corporation to its stockholders of income earned in the State of Wisconsin;

(2) The law rests upon the same constitutional basis as laws taxing the devolution of property by death and other comparable laws taxing transfers;

(3) Corporate earnings in the State of Wisconsin are taxable in Wisconsin, and the law in question merely serves to impose such a tax.

We do not expect any disagreement with counsel for respondents as to what the case in question held, but to avoid any question as to the analysis we have made, we quote the following passages from the court's opinion (*State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478):

“ * * * the word ‘privilege,’ as used in the statutes taxing privileges, is used as synonymous with right. * * * This court has so construed the word in the inheritance tax cases. * * * The tax is a privilege tax, or an excise tax, one form of which is a tax imposed on the transfer of property. The federal government in its stamp taxes, imposes a tax on the right to transfer property by deed; it formerly

imposed a tax on the right to transfer funds in banks by check; it imposes taxes on the transfer of property by inheritance or will. These taxes are best characterized as a tax on the transaction involved. The power of the state to impose excise taxes is under our system of dual sovereignty as broad as the power of the federal government. * * * (Pages 230-231)

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders." (Page 233)

* * * But the tax is an excise tax, a tax on the transaction involved. It is an excise tax imposed on the devolution of income, derived from transaction of business within the state, which is confessedly a proper subject of taxation. It is as much subject to an excise tax as is an inheritance tax, and the supreme court of the United States recognizes such taxes as not violating the United States constitution. * * * It is to be noted that the tax imposed on the salaries of nonresidents involved in the *Travis Case*, *supra*, [*Travis v. Yale & Towne Mfg. Co.*, (1920) 252 U. S. 60, 64 L. Ed. 460, 40 S. Ct. 228] was held not to impose a personal liability upon the nonresident employee. The tax, except as to a feature not involved herein, was upheld as a sequestration at their source of payment of earnings properly taxable which is precisely and only what the instant statute does." (Page 235)

"From some things in the briefs on the motion for rehearing we fear that we failed to make our position entirely clear in the original opinion. Our position is that the tax is an excise tax on the transfer of earnings resulting from property located or business transacted within this state, and stands on the same

basis of constitutionality that a state inheritance tax stands; that the tax of the state of New York on stock transfers, upheld in *Hatch v. Reardon*, 204 U. S. 152, 27 Sup. Ct. 188, stood; that the state tax in New York on the transfer of property by deed upheld in *Keeney v. New York*, 222 U. S. 525, 32 Sup. Ct. 105, stood; and that the tax on salaries of nonresidents earned within the state, upheld in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 40 Sup. Ct. 228, stood. Earnings from property or transactions within the state are as much subject to a transfer tax as property within the state passing by inheritance or deed or other form of transfer, or salaries earned within the state. * * *." (Page 240)

* * * The basis of the instant tax is the fact that the dividends result from earnings from property situated or business transacted within this state. Such earnings are a proper subject of taxation, and therefore a proper basis for an excise tax on the transfer of the dividends resulting therefrom. * * * (Pages 241-242)

* * * We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis Case*, *supra*, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state." (Pages 245-246)

Point B.

THE SUPREME COURT OF WISCONSIN IN THE CASE OF STATE EX REL. FROEDTERT G. & M. CO., INC. v. TAX COMMISSION, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 CORRECTLY APPLIED THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS THAT AMENDMENT IS CONSTRUED BY THIS COURT, IN DETERMINING THE CONSTITUTIONALITY OF SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED.

Since the Wisconsin Supreme Court in *State ex. rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 sustained the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, upon the theory that its constitutionality was determined by the same principles as apply to a determination of the validity of inheritance or estate taxes, it becomes necessary to determine whether, on the basis of such an analogy, the tax can be sustained under the Fourteenth Amendment to the United States Constitution as interpreted by the decisions of this Court.

Had the Wisconsin Court in the present cases altered its position as to the construction of the law there would, of course, be no occasion for examining its constitutionality in the light of the analysis made in a prior decision. We shall show, however, in the next point to be made in our argument that the construction of the law has not been changed by the Wisconsin Court. Consequently it becomes appropriate to determine the constitutional ques-

tion in the light of the analysis made in the first decision and a logical development of the argument requires that the problem be handled on that basis.

The decisions of this Court establish the following propositions:

(1) "Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.'"

Tyler v. United States, (1930) 281 U. S. 497, 502, 74 L. ed. 991, 50 S. Ct. 356;

New York Trust Company, et al. v. Eisner, (1921) 256 U. S. 345, 65 L. ed. 963, 41 S. Ct. 506;

Stebbins v. Riley, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;

Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

(2) The power to impose transfer, succession or legacy taxes is not dependent for its existence upon the power to regulate the transmission of property by death or upon the granting of a privilege to transmit or to receive property by death.

Stebbins v. Riley, (1925) 268 U. S. 137, 69 L. ed. 884, 45 S. Ct. 424;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;

Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

(3) The power of a state to impose a transfer tax is not dependent upon the event of death in that state. None of the cases decided by the court places emphasis upon the place of that event. Neither does the power of a state to tax a transfer depend upon those acts necessary to effectuate the transfer taking place within the state's territorial jurisdiction and pursuant to its laws.

Graves v. Elliott, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;

Bullen v. Wisconsin, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473;

Cf. Estate of Bullen, (1910) 143 Wis. 512, 128 N. W. 109.

(4) If a state has jurisdiction to impose a tax upon property, it may impose a tax upon the devolution by death of such property.

Graves v. Elliott (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;

Curry v. McCannless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803.

(5) A state may tax the income of individuals and corporations derived from business transacted and property located in the state.

Underwood Typewriter Company v. Chamberlain, (1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45;

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;

United States Glue Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499.

The application of the analogy drawn by the Wisconsin Supreme Court between the tax here in question and a tax upon transfers by death necessarily results, in view of the foregoing, in establishment of the following propositions:

(a) The tax here in question is, as held by the Wisconsin Court, an excise upon the transfer of corporate earnings, which embraces the right to transmit and the right to receive.

(b) The state may tax the transfer notwithstanding the fact that it does not grant the privilege to make the transfer and may not regulate it.

(c) The fact that dividends may be declared and paid outside the state pursuant to the law of another state does not deprive the state of the power to impose the tax in question.

(d) If jurisdiction to tax the thing transferred results in jurisdiction to tax the transfer, the State of Wisconsin may tax the devolution to corporate stockholders of corporate income earned in this State.

The analogy thus drawn between the tax here involved and transfer taxes upon the devolution of property by death, if the analogy is validly drawn, conclusively establishes the constitutionality of the tax law in question in the face of the jurisdictional objections that have

been raised against the law as it has been applied to the respondent corporations. It remains, therefore, to determine whether the Wisconsin Supreme Court in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 was justified in drawing the analogy. A consideration of this problem resolves itself into a consideration of two somewhat interrelated questions, as follows:

(1) Is the devolution of income from a corporation to its stockholders a proper subject for the imposition of an excise tax?

(2) Do the considerations which have been held to justify the imposition of an excise upon the transfer of property resulting from death justify as well the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders?

We shall discuss these questions in order.

First. The Wisconsin Supreme Court held in *State ex rel. Froedtert G. & M. Co., Inc., v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478 that the excise tax imposed by the law in question was a tax upon the exercise of rights, as distinguished from the exercise of privileges. In referring to the power of the State to levy excise taxes, and as authority for the imposition of an excise upon the transfer of corporate income from a corporation to its stockholders, the Court quoted the following passage from *Cooley, Constitutional Limitations* (7th ed.) p. 678:

“ * * * The power to impose taxes is one so unlimited in force and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation; to every object of industry, use, or enjoyment; to every species of possession.” * * *

State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission, (1936) 221 Wis. 225, 231-232, 265 N. W. 672, 267 N. W. 52, 104 A. L. R. 1478.

This Court has referred to the taxing power in the following language:

“ * * * The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. * * * ”

Tyler v. United States, (1930) 281 U. S. 497, 503, 74 L. ed. 991, 50 S. Ct. 356.

It has said that:

“ * * * In our system of government the States have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transactions within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. * * * ”

Shaffer v. Carter, (1920) 252 U. S. 37, 50, 64 L. ed. 445, 40 S. Ct. 221.

The Court has also said that:

" * * * Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

State Tax on Foreign-Held Bonds, (1872) 15 Wall. 300, 319.

Again, it has been stated that:

" * * * We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of National interference are well settled. There is no general supervision on the part of the Nation over state taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign both as to objects and methods. * * *"

Michigan Central Railroad Company v. Powers, (1906) 201 U. S. 245, 292-293; 50 L. ed. 744, 26 S. Ct. 459.

In a recent case the Court has had occasion to consider the nature of excise taxes and the subjects upon which they may be levied. In conformity with the view of the Wisconsin Court it is held that excises may be imposed upon the exercise of rights, as distinguished from privileges. It is held, moreover, that business is a legitimate subject of the taxing power and that the power to tax business comprehends the power to tax the activities and relations which inhere in the transaction of business.

Chas. C. Steward Mach. Co. v. Davis, (1937) 301 U. S. 548, 580, 581, 81 L. ed. 1279, 57 S. Ct. 883.

Within its territorial jurisdiction a state may select the modes and methods by which it will raise tax monies, subject only to those provisions of the Federal Constitution which restrain unwarranted exercise of the taxing power. No one can fairly argue that an excise upon the devolution of dividends is not an appropriate subject of taxation or that in and of itself the imposition of such an excise violates any provisions of the Federal Constitution. In fact such a transfer measures the fruits of corporate earnings transferred from a corporation to its members. And the transfer is fairly subject to ^atax which has for its purpose the taxation of Wisconsin corporate earnings at the point they become subject to the enjoyment of those who conduct a corporate business for the purpose of acquiring and distributing such earnings among themselves.

Second. Taxation has been said by this Court to represent a means or method of defraying the cost of government and it is held to rest upon the obligation of one enjoying the protection of the laws to contribute his just share toward defraying the cost of that protection.

First Bank Stock Corp. v. Minnesota, (1937) 301 U. S. 234, 241, 81 L. ed. 1061, 57 S. Ct. 677.

And so it is that protection afforded by a government in the acquisition, preservation and enjoyment of property or of income or protection afforded during the pursuit of gainful occupations has been held to afford a legitimate basis for the imposition of a tax by the government affording the protection.

Curry v. McCannless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;

New York ex rel. Cohn v. Graves, (1937) 300 U. S. 308, 81 L. ed. 666, 57 S. Ct. 466;

Union Transit Co. v. Kentucky, (1905) 199 U. S. 194, 202, 50 L. ed. 150, 26 S. Ct. 36.

As we have heretofore stated, the power to impose a transfer tax upon the devolution of property by death has been held to exist in any case where the taxing power extended to the imposition of a tax upon the property so transferred. Thus, in protecting the acquisition and enjoyment of property and enforcing rights which are of themselves property, a state derives the power to tax the property so protected and it derives as well the power to tax its transfer by death. The protection afforded by a state to property is reasonably related to the transfer of the property at death, since without the protection there would be no property to transfer. The right to transmit, the transmission, and the right to receive as applied to the devolution of property by death, would in each case be an empty form were it not for the protection afforded by the state to the subject transferred.

In the case of the transfer of corporate dividends the same basis for taxation exists that exists in the case of transfers of property by death, as we shall proceed to demonstrate.

The right to be a corporation or to do business in that form is a valuable privilege.

“ * * * It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. * * * ”

Home Ins. Co. v. New York, (1890) 134 U. S. 594,
599-600, 33 L. ed. 1025, 10 S. Ct. 593.

The object of the corporate form of enterprise is to do business in a form thought to be suited to the profitable transaction of business—to acquire earnings—and to distribute such earnings among the members of the corporation. The corporation itself is an artificial entity distinct from its members which exists for the purpose of transacting business and acquiring earnings but it is in the very nature of things incapable of enjoying its earnings. It is of the very essence of a corporate business enterprise that its earnings shall inure to the benefit of its members and that only its members shall enjoy its earnings.

Thus, protection of the law of a state in which a corporation does business is invoked and given for the purpose of making it possible to earn income for distribution to the members of the corporation. The protection so invoked and given cannot, therefore, be dissociated from the distribution of corporate earnings. Corporate income is earned for the purpose of distribution to the corporate members and the state protects the acquisition of corporate income in order that there may be earnings to distribute to the members.

There can be no doubt that the ultimate distribution of the fruits or profits from corporate business to its stockholders is the prime, if not the sole, objective of corporate

enterprise. Thus, a tax upon the transfer of corporate earnings derived from business transacted in the taxing state, is laid upon the benefits arising out of the exercise of rights under and protected by the laws of the taxing state. It taxes such benefits at the time they are realized by the very persons for whom they were earned and by whom, at the time of earning, it was intended they would be realized.

In the last analysis, therefore, as in the case of death duties, the tax involved in the present case may be rested upon the protection afforded by the state in relation to the subject of the transfer. As we have indicated, it is not too much to say that protection of the laws of the state is invoked and given in order to create the subject of the transfer for the purpose of transfer. And the state, since it has jurisdiction to tax the subject of the transfer (*Shaffer v. Carter*, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221; *United States Glue Company v. Oak Creek*, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499), at the time of transfer, may tax the transfer.

Thus we conclude that the Wisconsin Supreme Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, was justified in sustaining the validity of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to both foreign and domestic corporations upon the authority of the adjudicated decisions of this Court dealing with the taxation of incomes and inheritances.

Point C.

THE WISCONSIN SUPREME COURT IN THE INSTANT CASE, WHILE IT ADHERED TO THE CONSTRUCTION OF SECTION 3 OF CHAPTER 505, LAWS OF WISCONSIN, 1935, AS AMENDED, LAID DOWN IN THE CASE OF *STATE EX REL. FROEDTERT G. & M. CO., INC. v. TAX COMMISSION*, (1936) 221 WIS. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, ERRED IN HOLDING THAT THE DECISION OF THIS COURT IN *CONNECTICUT GENERAL LIFE INS. CO. v. JOHNSON*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436 REQUIRED THAT THE TAX BE INVALIDATED AS BEYOND THE TAXING JURISDICTION OF THE STATE OF WISCONSIN UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the instant cases the Wisconsin Supreme Court, while it adhered to the construction placed upon Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, nevertheless held the law invalid as applied to foreign corporations. The holding was based upon the assumption that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, left no alternative other than to declare that the law in question, as applied to foreign corporations, imposed a tax beyond the taxing jurisdiction of the state contrary to the Fourteenth Amendment to the United States Constitution.

That the Court adhered to its former construction of the law is perfectly clear. A few quotations from the majority opinion establishes that fact beyond question:

"This Court had the constitutionality of sec. 3, ch. 505, Laws of 1935, as amended before it in State ex. rel. Froedtert G. & M. Co., Inc., Tax Comm. of Wisconsin, 1936, 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 56, 104 A.L.R. 1478. That was an action for a declaratory judgment and was brought by a Wisconsin corporation. The Court held that the tax imposed upon the Wisconsin corporation pursuant to the provisions of sec. 3, ch. 505, as amended by Laws 1935, c. 552, was a valid tax. In that case the Court held that the language of the act 'for the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)' imposed an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders." (289 N. W. p. 679)

"There was a motion for a rehearing in the Froedtert case and briefs amicus curiae were filed by counsel appearing on behalf of foreign corporations. While the application of the law to foreign corporations was not before the Court upon the pleadings in the case, the Court concluded to consider the validity of the act as applied to foreign corporations and held: [221 Wis. 245] 'We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the

state. They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed, there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the Travis Case [Travis v. Yale & Towne Mfg. Co., 252 U. S. 60, 40 S. Ct. 228, 64 L. Ed. 460], supra, about imposing upon the employer liability for the income tax on salaries of nonresidents earned within the state.'

"This decision of the Court is vigorously assailed. We are earnestly besought to reconsider the decision of the Froedtert case so far as it applies to foreign corporations. It is agreed on all sides that the tax in question is an excise tax and this Court so held in the Froedtert case. The Court in effect held that the tax was an excise tax 'for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state' and was therefore subject to the jurisdiction of the state as are incomes and inheritances. It is apparent that upon this basis the tax imposed by subsec. (1), sec. 1 of the act can not be imposed upon dividends declared by a foreign corporation because they are not declared within this state nor is the privilege one granted by this state. To meet this objection on the motion for rehearing the Court held that a dividend declared by a foreign corporation was taxable to the extent that it was allocable to business transacted or property situated in this state because the dividend involved the distribution of earnings made within the state and such earnings had a constructive situs within the state." (Pages 679-680)

"In the Froedtert case we rejected the contention that the tax was a tax on property (221 Wis. at page 235, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478) and rested the right of Wisconsin to tax the dividend in question on the ground that that part of the dividend taxed having been earned within the state, the trans-

action of declaring and receiving the dividend had a situs within the state although the transaction took place in another state. * * *." (Page 681)

J. C. Penney Co. v. Wisconsin Tax Commission,
(1940) 233 Wis. (adv. sheets) 286, 289 N. W.
677.

That the court below rested its decision upon *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436, is equally clear as demonstrated by the following language in the opinion:

"This determination of the Supreme Court of the United States [*Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436] clearly holds that the fact that a fund which became the subject of a transaction in the state of Connecticut was earned within the state of California and might have been taxed there, does not give the transaction in Connecticut a situs within the state of California for the purposes of taxation. In our view the California case is a stronger case for jurisdiction to tax by a state than is the present case because in that case nothing but insurance premiums paid in California were dealt with and in levying the tax upon the company which did the business in California the amount of the reinsurance premiums was deducted in cases where the reinsurance premium was paid to a company authorized to do business in California. In both cases the thing taxed is a transaction without the state made pursuant to a privilege or right granted by another state measured by the amount of a fund earned in the taxing state. Under the *Connecticut General Life Ins. Co.* case, there being no constructive situs within the state of Wisconsin for the taxation of the transaction of declaring and receiving dividends in the state of New York, there is no basis for an excise tax within the state of Wisconsin upon the

dividend in question. Certainly the payment of a re-insurance premium on business done in the state of California to a company authorized to do business in California is more closely connected to California business than is the declaration of a dividend in the state of New York although that part of the dividend taxed accrued from earnings made in Wisconsin. If there is no situs for taxation purposes in the one case there certainly is not in the other. We are obliged to hold that the transaction of declaring and receiving the dividend in question was not taxable in the state of Wisconsin.

“[2] Diligent and able counsel for the state have been unable to suggest any other basis upon which the tax involved in this case can be sustained than that suggested in the Froedtert case. We have given the matter thorough and careful consideration because of the importance of the question involved and the effect a ruling adverse to the defendant will have upon state finances. While there is much to be said for the proposition that a foreign corporation admitted to do business in Wisconsin should be subject to the same burdens and liabilities as is a similar Wisconsin corporation, we must in the determination of this question conform to the law as laid down by the Supreme Court of the United States. The question here involved is one of the incidence of taxation and not whether the state has jurisdiction of certain corporate activities by reason of a business situs of a corporation. No claim is made that the plaintiff has any such situs nor is there any evidence in the record upon which such a claim can be based.

“[3, 4] We are strongly urged to affirm the judgment in this case because the state treasury is dependent upon the maintenance of the right of the state to tax dividends of foreign corporations to the extent that such dividends are derived from earnings within the state. The matter of financial exigencies of the state, however, afford no justification for the ignoring

of a rule of law laid down by the United States Supreme Court. The state must find its revenues within the field within which its taxing power may be exerted as prescribed by the constitution and laws of the United States." (Pages 681-682)

J. C. Penney Company v. Tax Commission, (1940)
233 Wis. (adv. sheets) 286, 289 N. W. 677.

We are not, therefore, confronted with a situation where the Wisconsin Supreme Court has changed its construction of the law but rather with a situation where, on the basis of its former construction, it felt compelled to invalidate its application of the law to foreign corporations upon ~~the basis~~ ^{agreement} of a subsequent decision rendered by this Court construing the taxing powers of the states under the Fourteenth Amendment.

We respectfully submit that the Supreme Court of Wisconsin erred in supposing that its decision in the case below was required by the holding of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 37, 82 L. ed. 673, 58 S. Ct. 436. In that case the question before the Court for decision was stated in its opinion as follows:

"Appellant is a Connecticut corporation, admitted to do an insurance business in California. In addition to its business conducted within that state it has entered into contracts with other insurance corporations likewise licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents there. These reinsurance contracts were entered into in Connecticut where the premiums were paid and where the losses, if any, were payable. The question for decision is whether a tax laid by Cali-

fornia on the receipt by appellant in Connecticut of the reinsurance premiums during the years 1930 and 1931, infringes the due process clause of the Fourteenth Amendment."

Connecticut General Life Ins. Co. v. Johnson,
(1938) 303 U. S. 77, 78, 82 L. ed. 673, 58 S. Ct.
436.

The Court's analysis of the problem presented is contained in the following language:

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General L. Ins. Co. v. Johnson*, supra (3 Cal. (2d) 87, 43 P. (2d) 278); compare *Morris & Co. v. Skandinavia Ins. Co.* 279 U. S. 405, 408, 73 L. ed. 762, 765, 49 S. Ct. 360. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No acts in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."

Connecticut General Life Ins. Co. v. Johnson,
(1938) 303 U. S. 77, 81, 82 L. ed. 673, 58 S. Ct.
436.

The conclusion reached was to the following effect:

"* * * All that appellant did in effecting the reinsurance was done without the state and for its trans-

action no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

Connecticut General Life Ins. Co. v. Johnson,
(1938) 303 U. S. 77, 82, 82 L. ed. 673, 58 S. Ct. 436.

As we understand the foregoing opinion, the holding simply amounts to the proposition that the State of California cannot tax a reinsurance business carried on in the State of Connecticut, even though it involves reinsurance contracts covering the lives of people who had originally been insured in the State of California. Putting the same thing differently, it was held that while the State of California may tax the transaction of business in that State, it may not tax a business which is transacted in another state.

The case at bar is an entirely different case. As was pointed out in the dissent of Justice Fowler (who wrote the opinion of the Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478):

" * * * The object of the California tax was the reinsurance premium received and contracted for in the state of Connecticut. The receipt and the contract were in no way connected with, in no way incidental to any transaction of the insurance company in California, and were in no way connected with or incidental to any earnings of the company from business conducted in California. The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business

transacted in the state of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed. The reason for the invalidity of the California tax does not apply to the instant case. * * *."

J. C. Penney Company v. Tax Commission, (1940)
233 Wis. (adv. sheets) 286, 289 N. W. 677, 683.

Thus, as indicated by Justice Fowler, the tax in the instant case is laid upon the distribution of corporate earnings derived from Wisconsin sources, under the protection of Wisconsin law, and confessedly subject to taxation in the State of Wisconsin.

The tax law here involved does not assume to tax any transaction outside the state, such as the declaration and payment of a dividend independent of the taxable situs of the income so devolved. It assumes to lay a tax upon a devolution of income which, for taxable purposes, occurs within the state and the power to tax the devolution is derived from the same source as the power to tax the income itself, namely,—the power to tax Wisconsin earnings.

Thus, we conclude that the Wisconsin Supreme Court erred in holding that the decision of this Court in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 41 L. ed. 673, 58 S. Ct. 436, required it to overrule its holding in the case of *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478 and to invalidate Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, as applied to foreign corporations, such as is respondent.

Point D.

THE DECLARATION AND PAYMENT OF DIVIDENDS OUTSIDE OF THE STATE OF WISCONSIN BY A FOREIGN CORPORATION DOES NOT ITSELF CONSTITUTE AN EVENT TAXABLE BY WISCONSIN AND THE COURT BELOW PROPERLY SO HELD. WHERE THE INCOME DISTRIBUTED IS DERIVED FROM WISCONSIN EARNINGS, HOWEVER, AND THUS FORMS THE SUBJECT MATTER OF THE TRANSFER, THE STATE OF WISCONSIN ACQUIRES JURISDICTION TO TAX THE TRANSFER.

In the cases below the Wisconsin Supreme Court, in its analysis as to state jurisdiction, applied the following reasoning:

(1) The exercise by a foreign corporation without the state of the power to declare and pay a dividend is not in itself taxable by the State of Wisconsin, since

(a) The privilege to declare the dividend is not granted by the State of Wisconsin, and,

(b) The physical acts of declaring and paying the dividend do not occur within the territorial limits of Wisconsin.

(2) The fact that a dividend so declared and paid by a foreign corporation is derived from Wisconsin earnings does not empower the state to tax the transfer of such earnings effected by the declaration and payment of said dividend, since this Court had, in substance, so held in *Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436.

With the first of these propositions we do not disagree. It is perfectly evident that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction.

But the present case does not turn upon any such consideration. The law here involved does not assume to tax a privilege granted by the State. As stated by the Court in *State ex rel. Froedtert G. & M. Co., Inc. v. Tax Commission*, (1936) 221 Wis. 225, 230, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478, the tax is laid upon the exercise of a right. Foreign corporations derive the privilege of declaring and paying dividends from the states of their incorporation. But, as indicated in the opinion of the Wisconsin Court in the *Froedtert Case* (221 Wis. 225, 265 N. W. 672, 267 N. W. 52, 104 A.L.R. 1478), the State of Wisconsin may tax the exercise of rights. And, as we have heretofore pointed out, the right to impose a transfer tax does not depend upon the fact that the taxing power grants the privilege to make the transfer.

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803;

Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. ed. 969, 20 S. Ct. 747.

So far as declaration and payment of the dividend in a state outside of Wisconsin is concerned, it may be said that while such a transaction is not an independent basis for the imposition of a tax by the State of Wisconsin, it is most certainly a taxable event if the subject matter of the transfer is taxable by the State of Wisconsin.

In *Estate of Bullen*, (1910) 143 Wis. 512, 128 N. W. 109, Mr. Bullen, by an instrument executed in the State of Illinois and pursuant to the laws of the State of Illinois, transferred intangible property in trust to trustees resident in Illinois. He reserved to himself control over the income of the trust during his life time and also the power to revoke the trust. He died, domiciled in the State of Wisconsin, without having exercised his power of revocation. Against the specific objection that the transfer was effectuated outside the State of Wisconsin pursuant to the laws of another state, the Wisconsin Supreme Court held that the intangibles forming the subject matter of the trust could be regarded as located at the domicile of the decedent for transfer tax purposes.

Upon appeal to this Court it was held, *Bullen v. Wisconsin*, (1916) 240 U. S. 625, 60 L. ed. 830, 36 S. Ct. 473, that the control retained by Mr. Bullen during his life time over the trust, and his power to revoke it, constituted important property rights. It was held that the non-exercise of the power of revocation during the life of Mr. Bullen resulted in the beneficiaries of the trust acquiring valuable rights by reason of Mr. Bullen's death. The court held that Mr. Bullen, having been domiciled in Wisconsin at the time of his death, the State could tax the transfer resulting from his death.

Substantially the same holding was made by this Court in *Graves v. Elliott*, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913.

In each of these cases the instrument pursuant to which the property was transferred was executed without the State that was permitted to impose a transfer tax,

and in each case the instrument was executed pursuant to the law of the State of its execution.

For a similar case see *Curry v. McCanless*, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 300, where a testamentary disposition by a person domiciled in the State of Tennessee of intangibles forming the subject matter of a trust held by an Alabama trustee and administered in Alabama was held to be subject to a transfer tax in the State of Alabama. In that case the testamentary act of the decedent occurred in Tennessee and presumably was executed according to the laws of the State of Tennessee.

These cases turn upon the application of a rule which, as we have pointed out, is well established by the decisions of this Court, namely, that where property forming the subject of a transfer is taxable by the State, its transfer occurs within the jurisdiction of the State for tax purposes.

It is thus evident that the declaration and payment of a dividend by a foreign corporation in the State of New York, while it is not, as we have said, in itself a taxable event in the State of Wisconsin, may constitute such an event when the subject matter of the transfer is taxable by the State of Wisconsin.

As to the second proposition held by the Wisconsin Supreme Court, namely that the derivation of income from Wisconsin earnings did not endow the State with power to tax a transfer of such earnings,—we have already demonstrated that the case thought by the Court to require such a holding (*Connecticut General Life Ins. Co. v. Johnson*, (1938) 303 U. S. 77, 82 L. ed. 673, 58 S. Ct. 436) is inapplicable. In fact such decisions of this Court as are ap-

plicable clearly demonstrate the error of the Court below in holding as it did.

The decisions of this Court, as we have heretofore pointed out, hold that a state in which a corporation or an individual acquires earnings may impose a tax upon those earnings or a tax measured by such earnings.

Underwood Typewriter Company v. Chamberlain,
(1920) 254 U. S. 113, 65 L. ed. 165, 41 S. Ct. 45;

Travis v. Yale & Towne Mfg. Co., (1920) 252 U. S. 60, 64 L. ed. 460, 40 S. Ct. 228;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221;

United States Glue Company v. Oak Creek, (1918) 247 U. S. 321, 62 L. ed. 1135, 38 S. Ct. 499.

The fact that the earnings of a corporation which are derived from the State of Wisconsin may be represented by bank deposits in other states obviously does not deprive the State of Wisconsin of the right to tax such earnings and so far as we are advised no one has ever contended that it did.

For the same reason, the presence of Wisconsin earnings in out-of-state banks can not affect the right of the State to impose a transfer tax on such earnings. In either event the jurisdiction to tax arises by reason of the fact that the earnings have been derived from Wisconsin and not by reason of the fact that there is any tangible subject of taxation within the State at the time the tax is imposed.

We are unable to determine how it can possibly be said that the net income of a foreign corporation has a situs in the State of Wisconsin for the purpose of imposing a tax upon that income but does not have a situs in the State

for the purpose of imposing a tax based upon its transfer from the corporation to the stockholders of the corporation in the form of dividends. Certainly the decisions of this Court neither require nor justify any such distinction.

Quite to the contrary we have been unable to find any case in which the power of a state to tax the subject of a transfer is not held to justify the imposition of a tax upon the transfer, so far as jurisdictional aspects are concerned. The following cases indicate that power to tax the subject is the proper test.

Graves v. Elliott, (1939) 307 U. S. 383, 83 L. ed. 1356, 59 S. Ct. 913;

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Rhode Island Hospital Trust Co. v. Doughton, (1926) 270 U. S. 69, 70 L. ed. 475, 46 S. Ct. 256;

Snyder v. Bettman, (1903) 190 U. S. 249, 47 L. ed. 1035, 23 S. Ct. 803.

Looking beyond the mere form of things it is evident that the stockholders of a corporation earning money within the State of Wisconsin, under the protection of its laws, for the purpose of distributing that money among themselves, may lawfully be required to pay something for the protection given them by the State of Wisconsin.

Curry v. McCanless, (1939) 307 U. S. 357, 83 L. ed. 1339, 59 S. Ct. 900;

Shaffer v. Carter, (1920) 252 U. S. 37, 64 L. ed. 445, 40 S. Ct. 221.

It certainly is not necessary, however, that the State of Wisconsin measure any tax exacted as payment for such

protection by the total net income of the corporation. The State can measure its exaction by that part of the net income which is distributed to its shareholders.

The fact that a tax is measured by the "amount of dividends declared" cannot be made the basis of a tenable constitutional objection to a taxing act imposing a tax so measured. The use of "amount of dividends declared" as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new but is supported by precedent of long standing. Pennsylvania, New York and the Federal Government have, at one time or another, imposed taxes which were measured by the amount of dividends declared by corporations.

As early as 1814, and for years thereafter, Pennsylvania imposed upon corporations, taxes measured in part or in whole by the amount of dividends declared.

See Sec. 10, Chapter 3902, Laws of Pennsylvania, 1814;
 Sec. 1, Act No. 232, Laws of Pennsylvania, 1840;
 Sec. 33, Act No. 318, Laws of Pennsylvania, 1844;
 Sec. 1, Act No. 523, Laws of Pennsylvania, 1859;
 Sec. 21, Act No. 332, Laws of Pennsylvania, 1889.

The above acts were applied and taxes levied thereunder sustained in numerous cases decided by the Pennsylvania courts, constitutionality thereof having been assumed, as it was neither raised nor considered.

*Commonwealth v. Cleveland, Painesville, and Ash-
 tabula R. R. Co.*, (1857) 29 Pa. St. 370;
Leghigh Crane Iron Co. v. Commonwealth, (1867)
 55 Pa. St. 448;

Phoenix Iron Co. v. Commonwealth, (1868) 59 Pa. St. 104;

Commonwealth v. Western Land & Improvement Co., (1893) 156 Pa. St. 455, 26 Atl. 1034.

New York also has enacted statutes imposing taxes on certain corporations which taxes were measured by the amount of dividends declared. See Sections 182 and 186, Article 9, Chapter 60, Consolidated Laws of New York. Here also the said acts were applied and taxes levied thereunder sustained, the constitutionality thereof apparently having been assumed, as it was neither raised nor considered.

People ex rel. Mercantile Safe Deposit Co. v. Sommer, (1913) 158 App. Div. 110, 143 N. Y. S. 313;

People ex rel. Adams Elec. Light Co. v. Graves, et al., (1936) 272 N. Y. 77, 4 N. E. (2d) 941;

People ex rel. Central Zone Property Corporation v. Graves, et al., (1937) 250 App. Div. 175, 294 N. Y. S. 177;

In the Matter of Mercantile Properties v. State Tax Commission, (1938) 278 N. Y. 325, 16 N. E. (2d) 352.

Chapter 361, Laws of New York, 1881, imposed upon every corporation a tax measured by each 1% of dividends declared in excess of 6% on capital stock, or if the dividends declared were less than 6% the tax was at a specified rate upon the par value of the capital stock. Over numerous constitutional objections, the said act was sustained in *Home Insurance Co. v. New York*, (1890) 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593, as applied to domestic corporations and in *Horn Silver Mining Co. v. New York*,

(1892) 143 U. S. 305, 36 L. ed. 164, 12 S. Ct. 403, as applied to foreign corporations merely licensed to do business in the State of New York.

Under Section 122 of the Federal internal-revenue law, as amended by the Act of 1866 (13 Stat. at Large 284, 14 Stat. at Large 138) there was imposed a tax of five per cent on all interest payable and dividends declared by any railroad or canal company, and other types of specified companies, whenever payable, and under the said Act the companies were authorized to deduct the amount of the tax from the amount payable to the bondholder or stockholder. The said Act was applied without question as to its constitutionality, its constitutionality being assumed, in *Barnes v. The Railroad*, (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544 and in *Bailey v. N. Y. C. & H. R. R. Co.*, (1875) 22 Wall. (89 U. S.) 604, 22 L. ed. 840. In *Railroad Co. v. Collector*, (1879) 100 U. S. 595, 25 L. ed. 647, the said Act was sustained over constitutional objections that the tax as applied to the amounts payable to citizens and residents of foreign countries was invalid.

For an even more recent Federal tax so measured, see: Act of Congress, Jan. 16, 1933, Chap. 90, Sec. 213(a) (48 Stats. at Large, pt. 1, page 206).

And so far as the presence of the corporate income within the State of Wisconsin is concerned, if the State could lay a tax upon the corporation measured by a percentage of its income distributed to stockholders, and payable at the time of distributing it, the State can certainly lay a tax upon the distribution of the income to the stockholders. In neither case is the income physically within the State. It is here for purposes of taxation only. And

jurisdiction that does not depend upon physical presence in the state, certainly is not lost by reason of physical absence from the state.

Curry v. McCannless, (1939) 307 U. S. 357, 83 L. ed. 1356, 59 S. Ct. 913;

First Bank Stock Corp. v. Minnesota, (1937) 301 U. S. 234, 81 L. ed. 1061, 57 S. Ct. 677.

Since the argument under this point of our briefs to some extent at least, involves a recapitulation of arguments already advanced we do not intend to belabor the court with a repetition of all such arguments. We merely direct the Court's attention, therefore, to those arguments advanced under Point B.

But one thing remains to be considered in this part of the argument. We contended in our petitions for certiorari that under the decisions of *Barnes v. The Railroads*, (1873) 17 Wall. (84 U. S.) 294, 21 L. ed. 544, and *Railroad Company v. Collector*, (1879) X Otto (100 U. S.) 595, 25 L. ed. 647, the tax here in question is, in substance, imposed upon the corporations required to pay it. Respondents will undoubtedly contend to the contrary as they did in the State Court. We do not relent from our position thus asserted. However, whatever may be the correct view upon that question is immaterial for the purpose of determining the constitutionality of the tax in question. The fact that the State of Wisconsin may not impose a tax upon the recipient of a dividend does not militate against the right of the State to impose a transfer tax upon a subject matter transferred to him and to require deduction of the amount of the tax from the subject of the transfer.

Greiner v. Lewellyn, (1922) 258 U. S. 384, 66 L.
ed. 676, 42 S. Ct. 324;
Snyder v. Bettman, (1903) 190 U. S. 249, 27 L.
ed. 1035, 23 S. Ct. 803.

We accordingly conclude that the State of Wisconsin had jurisdiction to impose the tax in question and that the decision of the Wisconsin Supreme Court to the contrary is erroneous and disregards the law as laid down by the decisions of this Court. The cases should be reversed.

Respectfully submitted,

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APPENDIX.

Section 3, Chapter 505, Laws of Wisconsin, 1935, Effective On Its Publication on September 26, 1935, and as Amended by Chapter 552, Laws of Wisconsin, 1935, Effective on Its Publication on October 8, 1935, Provides:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the

state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

(7) For the purposes of this section, dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividends or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

(Note: The same provisions are now contained, with some additions, in the present Wisconsin tax laws. See Section 71.60, Wis. Stats. 1939.

Chap. 309, Sec. 3, Laws of Wisconsin, 1937, extended its date of applicability to July 1, 1939.

Chap. 198, Sec. 1, Laws of Wisconsin, 1939, extended its date of applicability to July 1, 1941, and increased the rate of tax to 3%.)

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. [REDACTED]

46

STATE OF WISCONSIN and ELMER E. BARLOW, as Commis-
sioner of Taxation of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation,

Respondent.

**BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT
OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF WISCONSIN.**

W. H. DANNAT PELL,
G. BURGESS ELA,

Attorneys for Respondent.

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Supreme Court of the United States,

OCTOBER TERM, 1939.

No. 892

STATE OF WISCONSIN and ELMER E. BAR-
LOW, as Commissioner of Taxation
of the State of Wisconsin,

Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware
Corporation,

Respondent.

**BRIEF OF RESPONDENT OPPOSING PETITION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF WISCONSIN.**

I.

The Opinions of the Court Below.

The opinion and dissenting opinion in the Supreme Court of Wisconsin filed January 16, 1940, are reported in the Wisconsin Advance Sheets 233 Wis. 286 (1940), in 289 N. W. 677, and in the Record at p. 77. They do not appear to have been reported as yet in the Wisconsin Official Reports.

II.

Jurisdiction.

The assessment involved in this case was made by the Wisconsin State Tax Commission pursuant to Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended (set forth

in full in the Appendix of Petitioners Brief), which levies what is entitled a "Privilege Dividend Tax" (R. 46, 19). The tax is stated to be for "the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in . . ." Wisconsin. The rate of tax is $2\frac{1}{2}\%$ of dividends declared and paid.

The jurisdictional statement in the brief filed by counsel for petitioners indicates that they predicate the jurisdiction of this court upon Section 237(b) of the Federal Judicial Code (28 U. S. C. A. 344(b)) upon the ground that the assessment of tax made by the Wisconsin State Tax Commission against the respondent was held by the Supreme Court of Wisconsin to be invalid under the Fourteenth Amendment to the Constitution of the United States.

In its opinion the Supreme Court of Wisconsin states that the respondent contended that the application of the assessment to it deprived it of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article VIII, Section 1 of the Constitution of the State of Wisconsin. The opinion of the Court does not indicate that it intended to hold the Fourteenth Amendment to the Constitution of the United States to be more stringent than Article VIII, Section 1 of the State Constitution in restricting the state to objects of taxation within its borders. The logical inference is that, while it was persuaded to do so by the reasoning of this court, in *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U. S. 77, it intended to hold the law unconstitutional under both the State and Federal constitutions. If this is correct, this court is without jurisdiction. *Lynch v. New York ex rel. Pierson* (1934) 293 U. S. 52; *Leathe v. Thomas* (1907) 207 U. S. 93; *Ashwander v. Tennessee Valley Authority* (1936) 297 U. S. 288, at 347.

Statement of the Case.

The statement of facts as set forth in the petition for certiorari and brief in support of petition for writ of certiorari filed on behalf of the State of Wisconsin and Elmer E. Barlow as Commissioner of Taxation for the State of Wisconsin is substantially correct. There are several additional facts appearing in the record and relied upon by the respondent before the Supreme Court of Wisconsin which would seem to warrant statement, however.

During the years here involved J. C. Penney Company paid a franchise tax as a domestic corporation to the State of Delaware. During the same period it was qualified to do business in New York and paid the franchise tax of that state. It filed returns and paid income taxes to the State of Wisconsin for the years 1934, 1935, and 1936 (R. 27).

After the withdrawal of money from Wisconsin representing the proceeds of the sale of merchandise in that state (see petitioners' statement of facts, p. 16 of petitioners' Brief in Support of Petition for Writ of Certiorari) no Wisconsin employee of J. C. Penney Company had anything to do with it (R. 30):

As a Delaware corporation, J. C. Penney Company derives its power to pay dividends from Section 34 of the corporation law of that state which is, as follows:

"The directors of every corporation created under this chapter subject to any restrictions contained in its certificate of incorporation shall have power to declare and pay dividends upon the shares of its capital stock, either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27, and 28 of this Chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year" (R. 38) ✓

The resolutions pursuant to which the dividends in question were declared specifically stated that they were declared from the surplus of the company (R. 35). At the time of the declaration of each of said dividends, J. C. Penney Company had a surplus (R. 35) which represented its accumulated earnings for many years derived from all of the states of the United States (R. 41, 42).

The respondent, J. C. Penney Company, does business both within and without the State of Wisconsin (R. 27). The manner of computation of the tax in such a case is set forth in Subsection 4 of Section 3 of the law. In brief the total amount of money paid to stockholders as a result of each dividend was multiplied by the percentage of total earnings for the year preceding, made up of Wisconsin earnings for such year (such percentage being calculated by means of the Wisconsin income tax return of J. C. Penney Company for said year). The result was multiplied by the rate of tax ($2\frac{1}{2}\%$) giving the amount of tax. This method is illustrated by Exhibit "A" opposite page 46 of the record. The calculation there set forth was later modified, however, by the substitution of .025 as the rate of tax (R. 20). Only an insignificant amount of the tax involved was assessed with respect to dividends paid to Wisconsin residents (R. 9).

The Supreme Court of Wisconsin held the assessment of the State Tax Commission invalid upon the ground that in a case involving a foreign corporation the state had no jurisdiction to levy an excise tax upon a transaction, i.e., the payment and receipt of dividends, when no part of such transaction took place in Wisconsin.

IV.

ARGUMENT.

Summary of Argument.

(1) The Supreme Court of Wisconsin was clearly correct in holding that a state has no jurisdiction to levy an excise tax upon transactions of a foreign corporation taking place beyond its territorial limits, and such a holding is neither novel nor doubtful. *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U. S. 77; *St. Louis Compress Co. v. Arkansas* (1922) 260 U. S. 346; *Provident Savings Ass'n. v. Kentucky* (1915) 239 U. S. 103.

(2) The application of the tax to the payment and receipt of the dividends here involved cannot be sustained upon the ground that the surplus funds used by respondent for their payment may have been made up in part of income originally accruing to respondent from Wisconsin business. *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U. S. 77; *Provident Savings Ass'n. v. Kentucky* (1915) 239 U. S. 103; *Beidler v. South Carolina Tax Commission* (1930) 282 U. S. 1; *Rhode Island Trust Co. v. Doughton* (1926) 270 U. S. 69; *Newark Fire Ins. Co. v. State Board* (1939) 307 U. S. 313; *Wheeling Steel Corp. v. Fox* (1936) 298 U. S. 193.

(3) The assessment cannot be sustained on the ground that the tax is in substance a tax on doing business measured by net income, as the Supreme Court of Wisconsin has held that the tax is an excise upon the payment and receipt of dividends, and this court is bound by this construction. *Knights of Pythias v. Meyer* (1924) 265 U. S. 30; *Guaranty Trust Co. v. Blodgett* (1933) 287 U. S. 509. The fact that a foreign corporation engages in activities within a state which might be taxed does not justify a tax on its activities outside of the state. *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U. S. 77; *Provident Savings Ass'n v. Kentucky* (1915) 239 U. S. 103; *Atlantic Lumber Co. v. Comm'r* (1936) 298 U. S. 553. Nor is the tax "in substance"

an income tax since its incidence is neither upon the doing of business nor earning of income but upon the payment and receipt of dividends. *American Mfg. Co. v. St. Louis* (1919) 250 U. S. 459.

The assessment cannot be sustained upon the ground that the tax is an income tax upon stockholders because only an insignificant number of respondent's stockholders reside in Wisconsin. The derivation of a part of the income of the corporation from Wisconsin may not be attributed to stockholders as the corporate entity must be respected. *Klein v. Board of Supervisors* (1930) 282 U. S. 19; *Beidler v. South Carolina Tax Commission* (1930) 282 U. S. 1; *Rhode Island Trust Co. v. Doughton* (1926) 270 U. S. 69; *Miller v. Milwaukee* (1927) 272 U. S. 713. Furthermore, the State of Wisconsin has shown no intent to change its substantive law requiring that the corporate entity be respected. *Ellinger v. Wisconsin* (1938) 229 Wis. 71, 281 N. W. 701.

(4) The Supreme Court of Wisconsin correctly applied the applicable previous decisions of this court and as the principles of jurisdiction involved are settled the petition should be denied.

POINT ONE.

The Supreme Court of Wisconsin was clearly correct in holding that a state has no jurisdiction to levy an excise tax upon transactions of a foreign corporation taking place beyond its territorial limits.

Rule 38 of the rules of this court lays down certain principles for the guidance of counsel with respect to the nature of cases in which certiorari will or may be granted. The portions of this rule applicable to the instant case are, as follows:

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"* * *"

This rule indicates that in order to warrant consideration by this court a case of this sort must usually (1) involve a novel question of law, or (2) have been decided by the state court "in a way probably not in accord with applicable decisions of this court". This case falls within neither classification.

The tax law (Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended—see appendix petitioners' brief) provides that the tax is a "*privilege dividend tax*" and that it is a tax "*For the privilege of declaring and receiving dividends * * **" In a previous opinion, *State of Wisconsin ex rel. Froedtert G. & M. Co. Inc. v. Tax Commission* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, the Supreme Court of Wisconsin took occasion to define the exact nature of the tax. The following quotations would seem to be a fair statement of its conclusions:

"The tax is a privilege tax, or an excise tax, one form of which is a tax imposed upon the transfer of property" (p. 231).

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders" (p. 233).

"If the tax is an excise tax, and we hold that it is, it is entirely immaterial upon whom the burden of it ultimately falls. In a sales tax it falls, usually at least, upon the purchaser. In a stamp tax on deeds, it usually falls on the seller. In an inheritance tax, it falls on the recipient of the property. In the stock transfer tax above referred to it probably fell

upon the broker consummating the transfer. In a stamp tax on checks, it falls on the drawer of the check. In none of the cases is it a personal property tax against the person upon whom the burden of it ultimately falls" (p. 243).

In its opinion in this case the Supreme Court of Wisconsin repeated the second quotation 233 Wis. 286, at p. 292 (289 N. W. 677, at p. 679).

The evidence is clear and undisputed that in declaring and paying the dividends sought to be taxed all of the necessary acts were performed by J. C. Penney Company in the State of New York, that the dividends were paid from its surplus in the form of general funds standing to its credit in New York banks, that no part of the funds so applied could be earmarked as Wisconsin earnings or even as earnings for any particular year, that J. C. Penney Company performed no act in connection with the payment of such dividends in the State of Wisconsin, and that none of its books or records necessary in connection with the declaration or payment of such dividends were located in Wisconsin (R. 31, 32, 35, 41).

The transactions took place in New York pursuant to an authority conferred by the corporation laws of Delaware and exercised in New York as a result of the comity of that state accorded to a foreign corporation duly qualified to do business there. In other words Wisconsin sought to levy a privilege tax upon transactions of a foreign corporation in a case in which the privilege was not conferred by that state and in which the transactions concerned took place entirely outside its territorial limits.

It is clear from numerous decisions of this court that a state has no jurisdiction to levy a transaction tax under such circumstances. *Connecticut General Life Ins. Co. v. Johnson* (1938), 393 U. S. 77; *St. Louis Compress Co. v. Arkansas* (1922), 260 U. S. 346; *Provident Savings Ass'n v. Kentucky* (1915), 239 U. S. 103. In the first case cited, this court said (at pp. 80-81):

"Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *New York Life Insurance Co. v. Head*, 234 U. S. 149; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; *Compania General De Tabacos v. Collector*, 275 U. S. 87; *Home Insurance Co. v. Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *Roseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co. v. Graves*, 274 N. Y. 312; 8 N. E. (2d) 872; cf. *Provident Savings Life Assurance Society v. Kentucky*, 239 U. S. 103."

See also

Baldwin v. Seelig (1935), 294 U. S. 511.

Certainly the rule laid down in these cases is neither novel nor doubtful. Counsel for petitioners in order to avoid its force, advance several suggestions as to possible jurisdictional bases upon which they think the application of the tax to the respondent might be sustained. Respondent submits that such suggested bases are without foundation, and that many previous rulings of this court so hold.

POINT TWO.

The application of the tax to the payment and receipt of the dividends here involved cannot be sustained upon the ground that the surplus funds used by respondent for this payment may have been made up in part of income originally accruing to respondent from Wisconsin business.

In Point A of their argument, counsel for petitioners argue that the Supreme Court of Wisconsin erroneously applied the ruling of this court in *Connecticut General Life*

Ins. Co. v. Johnson (1938) 303 U. S. 77, and in support of this contention quote from the dissenting opinion of Mr. Justice Fowler in the instant case. The pertinent part of this quotation is, as follows:

"The object of the instant tax is the declaration of a dividend made in New York on earnings of the plaintiff corporation through business transacted in the State of Wisconsin. The declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed."

The facts show that the connection between Wisconsin earnings and the surplus of the corporation from which the dividends were paid is tenuous and that any Wisconsin earnings which might have been included had come to rest in New York before the occasion arose to pay them out as dividends. Without question Wisconsin had jurisdiction to tax the income of the corporation as it accrued to it in Wisconsin and it did so, but this characteristic of original derivation affords no basis of jurisdiction to tax at a later date a transaction in which such income then in the form of surplus may have been involved. Certainly Minnesota may not levy a sales tax on New York sales of automobiles on the ground that Minnesota iron was used in their construction. As the law with respect to intangibles has generally developed through the application of rules analogous to those applicable to personal property such an example seems pertinent. See *Wheeling Steel Corp. v. Fox* (1936) 298 U. S. 193.

In *Connecticut General Life Ins. Co. v. Johnson* (1938) 303 U. S. 77, it was contended that California had jurisdiction to tax the receipt in Connecticut of premiums on reinsurance paid by California corporations to the plaintiff with respect to California risks because the origin of such premiums gave them a constructive situs in California. This court met that argument, saying (at p. 80):

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. [Citing]. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within."

The reasoning of the majority opinion in this case holding the above reasoning of this court in *Connecticut General Life Ins. Co. v. Johnson* applicable appears in 233 Wis. 286, pp. 292-296, and 289 N. W. 677, pp. 679-682 (R. pp. 82, 83, 84, 85), and merits careful attention.

In *Provident Savings Ass'n. v. Kentucky* (1915) 239 U. S. 103, the state levied a franchise tax upon insurance companies for the privilege of doing local business which was based upon a percentage of premiums received from business done within the state. The plaintiff company ceased doing business in Kentucky but continued to receive premiums from Kentucky residents with respect to policies previously executed. This court held that the tax could not be applied to the plaintiff because it was not enjoying the privilege taxed, although it had held at the same term in *Equitable Life Society v. Pennsylvania* (1915) 238 U. S. 143 that premiums mailed to an out-of-state office of a com-

pany doing a local business might be included in the price for the privilege of doing local business. In other words, the characteristic of derivation from Kentucky was not sufficient to sustain the taxation of their receipt outside of the state.

In *Beidler v. South Carolina Tax Commission* (1930) 282 U. S. 1, the state of South Carolina attempted to impose its inheritance tax upon unpaid dividends of a domestic corporation in a case involving a non-resident decedent. The fact that the corporation was a South Carolina corporation, and that its dividends were presumably at least in part earned there, was not sufficient to render them subject to the tax. See also *Rhode Island Trust Co. v. Doughton* (1926) 270 U. S. 69.

Various suggestions occur in the decisions of this court with respect to the situs of intangibles for tax purposes—state of incorporation, state of commercial domicile, state of use or application, see *Newark Fire Ins. Co. v. State Board* (1939) 307 U. S. 313; *Wheeling Steel Corp. v. Fox* (1936) 298 U. S. 193—but no case so far, as counsel for respondent have discovered, suggests that such a situs exists in the State of origin of intangibles which survives their use and application elsewhere, and the cases above referred to are conclusive that there is none.

POINT THREE.

The assessment of the Wisconsin State Tax Commission cannot be sustained on the ground that the tax is in "substance" a tax upon doing business measured by net income nor may it be sustained as an income tax upon the stockholder.

Counsel for petitioners in Point C of their brief suggest that as an income tax on earnings within the state is clearly valid, this court should look to the economic effect of the tax and sustain it as "in effect" a tax on doing business in

Wisconsin measured by net income—payment of the tax being postponed until such time as the income is paid out in dividends.

Counsel for petitioners seem to infer that the Supreme Court of Wisconsin in the case of *State ex rel. Froedtert G. & M. Co. v. Tax Commission* (1936) 221 Wis. 225, 265 N. W. 672, 267 N. W. 52, rested the authority to impose the tax in question on the power to tax the transaction of corporate business in the State of Wisconsin. It is true that the court said in that case 221 Wis. 225 (at p. 245):

“We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived * * *.”

A study of the language above quoted and its context discloses that it was used by the court in support of an argument that the derivation of income from within the state conferred jurisdiction upon it to tax the transaction occurring outside of the state involved in the payment and receipt of a dividend made up in part of such income. The language of the Wisconsin Court in the instant case forecloses any possible question on this point and clearly indicates that the language of that court quoted at p. 7 hereof, declaring the tax to be an excise upon a transaction, correctly presents its views. The argument of “constructive situs” based on derivation is that which was rejected by the majority of the court in this case, but was reiterated by Mr. Justice Fowler in his dissent.

This court has declared that it must accept “the decision of the highest court of the state fixing the meaning of state legislation, as though the meaning had been specifically expressed therein.” *Knights of Pythias v. Meyer* (1924) 265 U. S. 30, at p. 32; *Guaranty Trust Co. v. Blodgett* (1933) 287 U. S. 509. This court is, therefore, bound by the construction by the Supreme Court of Wisconsin of the instant tax as “an excise or privilege tax upon the transaction in-

volved of transferring the dividends from the corporation to its stockholder" (221 Wis. 225, at 233), and is not at liberty to construe it otherwise.

The mere fact that a corporation performs acts which might subject it to tax in one way does not justify an application of the taxing power of the state to a subject of tax beyond its jurisdiction. It was argued in *Connecticut General Life Insurance Co. v. Johnson* (1938) 303 U. S. 77 that since insurance companies were given a deduction in the amount of reinsurance carried in companies licensed to do business in California that exactly the same result could be obtained by limiting this deduction. Economically, of course, the result would have been the same. This court said (at p. 80):

"It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power."

See also *Provident Savings Ass'n. v. Kentucky* (1915), 239 U. S. 103, referred to at p. 11, *supra*. Compare also *Atlantic Lumber Co. v. Comm'r. of Corporations & Taxation* (1936), 298 U. S. 553.

Should this court deem it fit to look to the economic effect of the tax, however, it is clear that it is not the equivalent of an income tax upon the corporation (or a tax on doing business measured by net income) because the incidence of the tax is upon the transaction of paying and receiving dividends, not upon the earning of income. This is illustrated by the case of *American Mfg. Co. v. St. Louis* (1919), 250 U. S. 459, in which a city license tax upon manufacturing was measured by sales of the manufactured articles wher-

ever made. The court felt that the measure of the value of the privilege was a fair one. It was argued that the incidence of the tax was upon sales rather than on manufacturing because, if the goods were not sold, there would be no tax. The court answered this, as follows (at p. 464):

“ * * * it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods.”

It is clear that under the test discussed in this case the incidence of the tax is where the statute places it—on the payment and receipt of dividends. While in the case of manufacturing, it is hardly possible to conceive that any material portion of the goods manufactured should not be sold, it is indeed most likely that a large portion of income realized will never be paid out in dividends. A corporation may wish to expand in which case its surplus is invested in capital assets. By an increase in the par value of its shares or a declaration of a stock dividend, the surplus may find its way into the capital account of the corporation and no longer be available at all for dividends. Most corporations carry a moderate surplus from the net income in good years for the purpose of meeting losses incurred in bad ones. If the surplus is lost, it, of course, may not be paid out in dividends. Again, if the capital of the corporation is impaired, the net income must be used to make up the deficit in this account, and may not be used for dividends. Again, a corporation may have a very profitable business in Wisconsin from which it derives a large income and an unprofitable business elsewhere through which it loses its Wisconsin income. It is self-evident that two corporations

might each have net incomes in Wisconsin of \$100,000 and one be required to pay a tax of \$2,500, and the other no tax at all at any time. The foregoing illustrations must render it clear that the fact that a corporation derives a net income from Wisconsin has almost nothing to do with its liability to pay a tax. Surely it would not be proper for this court to pick another subject to tax which is admittedly within the taxing jurisdiction of the state, but which has no relation to the occasion of the imposition of the tax either nominally or substantively and sustain the tax as a tax on such subject.

On page 22 of their brief, counsel for the petitioners cite several cases involving the Civil War income tax. One of the provisions of this law required corporations to deduct the amount of an income tax from dividends paid to stockholders and there was considerable controversy as to whether the tax was on the shareholder or the corporation. The provision with respect to the deduction of the amount of tax from dividends was a part of a scheme for the measurement of income devised by Congress long before the adoption of the method used in the present law. The method employed was to tax the corporation with respect to funds going into each of the "corporate pockets" into which income might be put. Dividends were simply one of those named. *Railroad Co. v. Collector* (1879), 190 U. S. 595. The law was a Federal and not a state law, and the method of measurement of income was probably approximately fair. Those cases are hardly sufficient to warrant a state's selecting only one use to which income may be put and denominating a tax thereon a corporate income tax.

The petitioners next suggest that the tax might be deemed the equivalent of an income tax on stockholders and urge as a basis of jurisdiction that the respondent derives a part of the income which ultimately inures to its stockholders from within the state. *Miller v. Milwaukee* (1927), 272 U. S. 713, is cited as authority that at times the corporate veil may be penetrated.

This court has repeatedly held, however, that the corporate entity must be respected for tax purposes saying:

"But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true * * *"

Klein v. Board of Supervisors (1930) 282 U. S. 19 (at p. 24); *Beidler v. South Carolina Tax Commission* (1930) 282 U. S. 1; *Rhode Island Trust Co. v. Doughton* (1926) 270 U. S. 69.

In *Miller v. Milwaukee*, *supra*, this court recognized this to be the general rule, but found that the state was attempting to urge the inviolability of the corporate entity in order to reach a prohibited result. The instant case resembles the *Beidler* and *Rhode Island Trust Co.* cases, and no special circumstances exist sufficient to withdraw it from the operation of the rule of those cases.

Furthermore, it seems to be the policy of the State of Wisconsin to consider the corporation a separate entity for tax purposes. *Ellinger v. Wisconsin* (1938) 229 Wis. 71, 281 N. W. 701. In the absence of some indication that the state desires to change its substantive law treating the corporation as a separate entity in order to extend its jurisdiction to tax (and neither the statute nor the decision of the Supreme Court of Wisconsin contains any such indication), it would hardly lie within the province of this court to reverse the judgment upon the ground that, if the state desires to change its rule of substantive law it may constitutionally do so.

Conclusion.

In Point B of their brief, counsel for petitioners have argued that there is no case involving the application of a statute of the type of Section 3 of Chapter 505, Laws of Wisconsin, 1935, as amended, to facts similar to those here involved, and this must be conceded. However, a study of the foregoing points of this brief will disclose that the prin-

ciples of jurisdiction involved are settled and have been repeatedly applied by this court in cases which are indistinguishable except for the name given to the tax sought to be imposed. As the decision of the Supreme Court of Wisconsin is clearly correct, it would serve neither the interest of the State of Wisconsin nor of the respondent to permit further litigation and the consequent delay in the final settlement of the issues here involved.

For the foregoing reasons, respondent prays that petitioners' Petition for Writ of Certiorari to the Supreme Court of Wisconsin be denied.

Respectfully submitted,

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Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 46.

STATE OF WISCONSIN and ELMER E. BARLOW, as Com-
missioner of Taxation of the State of Wisconsin,
Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation,
Respondent.

BRIEF OF RESPONDENT.

✓ W. H. DANNAT PELL,
✓ ROSWELL DEAN PINE, JR.,
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Supreme Court of the United States,
OCTOBER TERM, 1940.

No. 46.

STATE OF WISCONSIN and ELMER E.
BARLOW, as Commissioner of Taxa-
tion of the State of Wisconsin,
Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware
Corporation,
Respondent.

BRIEF OF RESPONDENT.

I.

The Opinions of the Court Below.

The opinion and dissenting opinion in the Supreme Court of Wisconsin filed January 16, 1940, are reported in 233 Wis. 286 (1940), in 289 N. W. 677, and are printed in the Record at p. 77.

II.

Jurisdiction.

The jurisdictional statement in the brief filed by counsel for petitioners indicates that they predicate the jurisdiction of this court upon Section 237 (b) of the Federal

Judicial Code (28 U. S. C. A. 344(b)) upon the ground that the assessment of tax made by the Wisconsin State Tax Commission against the respondent was held by the Supreme Court of Wisconsin to be invalid under the Fourteenth Amendment to the Constitution of the United States. Respondent contends that the court below relied upon the Wisconsin State Constitution as well as the United States Constitution and that accordingly this court is without jurisdiction. *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 (1934); *Leathe v. Thomas*, 207 U. S. 93 (1907); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936). This court granted petitioners' petition for writ of certiorari (310 U. S. 618).

III.

Statement of the Case.

The statement made under this title at pages 5 to 8 inclusive of petitioners' brief is substantially correct. It should be noted, however, that Section 3 of Chapter 505, Laws of Wisconsin 1935, as amended, which is the statute here involved, is entitled "Privilege Dividend Tax" and imposes a tax which is said to be "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state (Wisconsin)".

The principal question here at issue is the constitutionality of an assessment made by the Wisconsin State Tax Commission under this statute with respect to dividends declared and paid outside the state by respondent, a foreign corporation. There is an additional question, however, concerning the applicability to the facts of the instant case of the presumption contained in Subsection 4 of the statute which presumption concerns the source from which dividends are paid. This question was not decided by the Wisconsin Supreme Court inasmuch as it held the assessment invalid upon other grounds.

A separate section of petitioners' brief is entitled "Summary of Facts". As petitioners state these facts are not in dispute and they are partially covered by stipulation (R. 43). Inasmuch as petitioners' summary omits numerous facts which we regard as material, however, we have taken the liberty of setting them forth in somewhat more detail.

The respondent was incorporated under the laws of Delaware on December 15, 1924 and has a statutory office in that state (R. 26). Its principal office for the transaction of business is located at 330 West 34th Street, New York City, and was located there during the years 1934, 1935 and 1936. It is qualified to do business as a foreign corporation both in the State of New York and the State of Wisconsin (R. 27). In 1934, 1935 and 1936 and presently the respondent was and is engaged in the business of operating retail department stores in all of the 48 states of the Union (R. 27, 28). During 1934 it operated 47 stores in the State of Wisconsin. In 1935 and 1936 it operated 48 stores in Wisconsin (R. 28) but had no executive offices in Wisconsin, its sole business therein consisting of the operation of the stores mentioned (R. 34). During the years 1935 and 1936, the respondent was required to pay a franchise tax as a domestic corporation in the State of Delaware. During the same period, it paid taxes to New York as a foreign corporation. During the years 1934, 1935 and 1936, it filed returns and paid income taxes to the State of Wisconsin (R. 27). It also made a report of the payment of the dividends here involved but took the position that it was not liable for the tax and never paid it (R. 27).

At the end of the calendar years 1934, 1935 and 1936 the respondent had a large surplus (R. 35) which represented the accumulated earnings from many years derived from all of the states of the Union (R. 41). Wisconsin earnings and earnings for particular calendar years were not segregated and had lost their character as earnings derived from any particular source long before the dividends here involved were paid, and it would be an utterly impossible task to

figure what part of the surplus was attributable to income of Wisconsin stores (R. 29, 41, 42).

Section 34 of the Delaware Corporation Law under which respondent was incorporated, is the law from which it derives its power to pay dividends. This law provides:

"The directors of every corporation created under this chapter subject to any restrictions contained in its certificate of incorporation shall have power to declare and pay dividends upon the shares of its capital stock, either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding year" (R. 38).

Acting pursuant to this authority respondent declared and paid the following dividends upon the dates set forth below:

<i>Date Paid</i>	<i>Amount Per Share</i>	<i>Total Amount Paid to Stockholders</i>
12/31/35	\$2.25	\$ 5,555,214.00
3/31/36	.75	1,851,738.00
6/30/36	.75	1,851,738.00
9/30/36	1.00	2,468,984.00
12/15/36	4.75	11,727,674.00

(R. 31).

The resolutions pursuant to which these dividends were declared specifically stated that they were declared from the surplus of the company (R. 35); and in view of the fact that there was a surplus, this was the only source from which they could have been made payable under the Delaware law.

By a notice of additional assessment dated July 16, 1937 the Wisconsin State Tax Commission assessed a Privilege Dividend Tax against the respondent in the amount of \$22,696.37 together with interest and penalties (R. 49) (Ex. A, R. 46) (R. 63). This assessment was made

pursuant to Chapter 505 of the Wisconsin Laws of 1935 effective September 26, 1935, as amended by Chapter 552 of the Laws of 1935, effective October 9, 1935, Chapter 233 of the laws of 1937, effective June 15, 1937, and Chapter 309 of the Laws of 1937, effective July 1, 1937. In making its assessment the Wisconsin State Tax Commission ignored the actual source of the dividend payments as above set forth and applied the presumption that the dividends in each case were paid from an exactly proportionate part of Wisconsin earnings, for the year preceding the one in which the dividends were paid. This presumption was applied in the case of 1936 dividends even though the record shows that two million more dollars were paid out in dividends in 1936 than total earnings of 1935. The manner in which the Wisconsin State Tax Commission calculated such tax is as follows:

During the year 1934, the respondent had a total net income computed on a Wisconsin income tax basis of \$16,022,607 and in 1935 a total income (computed in the same manner) of \$15,233,478 derived from business transacted in all 48 states. Under the formula set forth in the Wisconsin income tax law, \$562,331 of the above net income for 1934 and \$587,001 of the above net income for 1935 were allocable to Wisconsin as derived from business transacted in that state (Ex. A, R. 46). Using these income tax figures, the Wisconsin State Tax Commission ascertained that the percentage of the 1934 income allocable to Wisconsin was 3.5096% and that the percentage of 1935 income so allocable to the State of Wisconsin was 3.8558%. After multiplying total dividends paid in 1935 by .035096, and total dividends paid in 1936 by .038558, the resulting figures were multiplied by the rate of tax fixed by the State Tax Commission (.025641) and penalties and interest were added, the final figure being the amount of the assessment (Ex. A, R. 46).

The rate of tax, 0.025641, was used by the State Tax Commission instead of the statutory rate of .025 because of a ruling of the Tax Commission that when a corporation

failed to deduct the tax from the dividend it in effect paid a tax which was due from the stockholder, thus increasing his dividend by this amount. Under the decision of the State Tax Commission on July 21, 1938 (R. 20) the rate of tax fixed by the State Tax Commission was reduced from .025641 to .025, reducing the principal amount of the tax assessed to \$22,128.97 and reducing the interest and penalties to \$1,457.82 making a total of \$23,586.79.

The following are certain of the details with respect to respondent's manner of conducting its operations and disbursing its funds. The total proceeds from the sales of goods in Wisconsin stores and in stores in all other states are deposited in local banks. From such accounts, payments are made for local payrolls, rents, advertising and other local expenses. The balance not needed to meet such expenses is transferred to the Company treasurer's office in New York City and deposited in New York City banks to the general credit of the respondent (R. 29). After funds leave the local Wisconsin banks no one in that state has anything further to do with them (R. 30). The monies, after leaving the local banks, completely lose their identity as monies derived from any particular source. The funds so deposited to the credit of the company in New York are used to pay salaries, general overhead of the New York and other offices, taxes and dividends. Checks are also drawn upon the New York accounts in payment for merchandise purchased from all sources and shipped to the various stores of the company, including those in Wisconsin (R. 29).

All of the stock books, minute books and the secretary's records of the company are kept within the State of New York except that a duplicate stock ledger is kept in Delaware as required by the laws of that state. All transfers of shares of the company are made in New York by the transfer agent of the company. All directors and stockholders meetings of the respondent are held in the State of New York and the dividends involved in this assessment were declared at directors meetings held at the principal

offices of the company at 330 West 34th Street, New York City (R. 30, 31). The actual payment of such dividends was effected by the executive officers of the company who caused checks to be drawn upon the accounts of respondent in its New York banks, payable to the stockholders of record upon each dividend record date. Such checks were placed in envelopes addressed to each stockholder of record upon each dividend record date at his address as the same appeared upon the records of the company, and were duly mailed from the post office in New York City (R. 32). All of the books and records of the company used in the payment of such dividends were situated in the State of New York (R. 31). No act in connection with the declaration or payment of the dividends in question was performed within the State of Wisconsin and no act in connection with the receipt of such dividends was performed in Wisconsin except that a small percentage of stockholders of the company received their mail in that state (R. 32, 33).

On December 31, 1935 the percentage of respondent's stock held by Wisconsin residents was 1.33%; on March 31, 1936, 1.34%; on June 30, 1936, 1.36%; on September 30, 1936, 1.38%; and on December 15, 1936, 1.13% (R. 32). The following table shows (1) the total amounts received by Wisconsin residents on the payment of each of the dividends involved in this case; (2) the portion of such amounts received by Wisconsin residents allocable to Wisconsin earnings (this is calculated by the use of the percentages used by the Tax Commission in making its assessment); and (3), the tax on amounts received by Wisconsin residents allocable to Wisconsin earnings upon the basis used by the State Tax Commission:

Dividend Date	(1)		(2)		(3)
12/31/35	\$ 74,065.50	x .035096	\$2,599.40	x 2 1/2%	\$ 64.99
3/ 3/36	24,814.50	x .038558	956.80	x "	23.92
6/30/36	25,320.00	x "	976.29	x "	24.41
9/30/36	34,097.00	x "	1,314.71	x "	32.87
12/15/36	133,147.25	x "	5,133.89	x "	128.35
			Total		\$274.54

The above figures represent the face amount of tax without penalties or interest (R. 33, 34).

The entire balance, amounting to \$21,854.43 of said corrected assessment of \$22,128.97 (without interest or penalties therefor) represents the tax on dividends received outside of Wisconsin by persons residing outside of the State of Wisconsin. Over 96% of the stockholders of the company owning 98% of the stock reside outside of Wisconsin (R. 33).

The respondent at no time deducted any of the alleged taxes from the dividends paid to its stockholders (R. 9, 48, 47; Ex. A., R. 46).

The Supreme Court of Wisconsin held the assessment referred to above unconstitutional under the Fourteenth Amendment to the Constitution of the United States. Petitioners thereafter filed a petition for a writ of certiorari which this Court granted, 310 U. S. 618.

IV.

Summary of Argument.

I.

The decision of the Supreme Court of Wisconsin is clearly correct in holding that the State of Wisconsin has no jurisdiction to tax the declaration and receipt of the dividends here involved. The state court construed the law to impose an excise or privilege tax upon the transaction of transferring dividends from a corporation to its stockholders. The state may not impose an excise tax upon a transaction which takes place beyond its borders. The privilege of paying dividends is conferred upon a corporation by the state of its incorporation. Jurisdiction in the State of Wisconsin can not be rested either upon the exercise of the privilege or right in that state or upon the ground that the privilege exercised was granted by its law.

In order to avoid this dilemma petitioners argue (a) that if the state has jurisdiction to tax property, it may impose a tax upon the devolution of such property and (b) that the state has a right to tax the surplus employed in paying the dividends involved in this case because respond-

ent earned a part of the funds comprising such surplus within the State of Wisconsin. Respondent contends that neither of these propositions is sound.

As to the first, an excise tax is a tax imposed upon a privilege, transaction or act rather than upon property. Accordingly the place of exercise of such privilege or in which such transaction or act occurs, not the situs of the property involved for purposes of ad valorem taxation, determines state jurisdiction to tax.

As to petitioners' second proposition, even if the rules of jurisdiction governing property and succession taxes be applied, the fact that respondent's surplus may have included funds which were originally added to it as a result of Wisconsin earnings is insufficient to rebut the presumption that the intangibles of a corporation are taxable only by the state of incorporation. No case has held that the original derivation of earnings alone is sufficient to give bank accounts containing them a situs for taxation purposes in the state of such derivation and there are many which affirmatively indicate that it is not.

The tax can not be sustained upon the same jurisdictional basis as an income tax upon foreign corporations which do business within the state. The tax is not an income tax upon the corporation. The statute declares that it is for the privilege of declaring and receiving dividends and the Supreme Court of Wisconsin has so held. Furthermore, it is not similar to such an income tax as an income tax is levied upon the earning or accrual of income which takes place within the state, not upon a transaction which takes place elsewhere. The incidence of the Privilege Dividend Tax is where the statute places it, upon the declaration and receipt of dividends, not upon the earning of income by the corporation.

The analogies which petitioners seek to draw from certain of the succession tax cases are remote and conflict with many decisions of this Court. The property, franchise and Civil War income tax statutes referred to by petitioners are not at all similar to the instant law as the subject of tax in each of such cases was admittedly proper.

II.

The Wisconsin State Tax Commission in making the assessment here involved purported to follow a presumption set forth in subparagraph 4 of the law. In so doing it "presumed" that respondent in paying its dividends employed that proportion of its Wisconsin earnings for the preceding year which its total Wisconsin earnings for such preceding year bore to respondent's total income for such preceding year. This presumption is clearly contrary to the facts because such dividends were specifically declared by respondent's directors as provided by statute from its surplus which represented the accumulated earnings of respondent and its predecessor company for many years and from all of the states in the Union. Wisconsin earnings entering into such surplus had lost their character as such long before the dividends in question were paid. Furthermore, respondent's total 1936 dividends were considerably larger than its 1935 earnings from which they were presumed to have been paid. If the presumption established by subparagraph 4 of the statute is rebuttable, it is rebutted by the facts in the record. If construed to require a finding contrary to the admitted facts, it is unconstitutional as arbitrary and unreasonable.

There is a third possibility that the presumption should be interpreted as establishing a rule of substantive law which directs the source to be used in the payment of dividends. This subject, however, is governed by the law of the state of incorporation and that of no other state. The Corporation Law of Delaware in which respondent is incorporated gave respondent power to pay dividends from surplus and made it illegal for it to pay them from any other source. Any attempt by the State of Wisconsin to lay down a different rule amounts to an unconstitutional interference with the duties and privileges of a foreign corporation exercised beyond its jurisdiction.

POINT I.

The opinion of the Supreme Court of Wisconsin is clearly correct in holding that the State of Wisconsin was without jurisdiction to tax the declaration and receipt of dividends here involved.

In its opinion below the Supreme Court of Wisconsin held an assessment of taxes made by the Wisconsin State Tax Commission under Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended, against the respondent unconstitutional under the Fourteenth Amendment to the Constitution of the United States. The provisions of the law pertinent to this controversy are:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the State of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the State of Wisconsin. The

amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state."

As stated in petitioners' brief the constitutionality of this statute was first considered by the Supreme Court of Wisconsin in the case of *State of Wisconsin ex rel. Froedtert Grain & Malting Co. Inc. v. Tax Commission of Wisconsin*, 221 Wis. 225, 265 N. W. 672 (1936), in an action for a declaratory judgment instituted by a Wisconsin corporation. The statute was held to be constitutional. Upon motion for rehearing it was argued among other things that the law was invalid as to foreign corporations and consequently entirely void. Although no foreign corporation was a party to the suit, the court concluded, in view of the importance of the question and the fact that several foreign corporations had submitted briefs, to consider its validity as to such corporations. It then held the tax constitutional as to foreign as well as domestic corporations. 221 Wis. 240, 267 N. W. 52. As petitioners contend that the opinion of the Supreme Court of Wisconsin delivered upon the motion for rehearing in the *Froedtert* case rather than its opinion in the instant case is correct, respondent has hereinafter at pages 22, 23, 24 analyzed the grounds of decision in said opinion in detail.

The Supreme Court of Wisconsin has been consistent in its construction of Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended, as imposing "... an excise or privilege tax upon the transaction involved of transferring

the dividends from the corporation to its stockholders" (Instant case, 233 Wis. 291; *Froedtert* case, 221 Wis. 233). Because of the contention raised in the *Froedtert* case that the Privilege Dividend Tax was in effect a property tax upon the dividends and accordingly invalid as to non-resident stockholders, the Supreme Court of Wisconsin discussed its nature at some length both in its original opinion and in its opinion upon the motion for rehearing.

There are several quotations from the opinions in the *Froedtert* case discussing the nature of the tax which we would like to add to those included in petitioners' brief. At page 231 in the *Froedtert* case the court said:

"* * * The briefs in opposition to the tax are largely beside the case, because they do not recognize the true nature of the tax. The tax is a privilege tax, or an excise tax, one form of which is a tax imposed on the transfer of property. The federal government in its stamp taxes imposes a tax on the right to transfer property by deed; it formerly imposed a tax on the right to transfer funds in banks by check; it imposes taxes on the transfer of property by inheritance or will. These taxes are best characterized as a tax on the transaction involved. * * *

Upon the motion for rehearing the court said at page

243:

"The brief on motion for rehearing assumes that we have held the tax imposed by the statute to be against the corporation. We did not in the original opinion take the position that the tax is necessarily one against the corporation. We pointed out that one decision of the Supreme Court of the United States, *Barnes v. Philadelphia & R. R. Co.*, 17 Wall. 294, 21 L. Ed. 544, has held that a tax on corporate dividends payable by the corporation was one against the corporation, and that another, *Travis v. Yale & Towne Mfg. Co.*, *supra*, has held that the only liability for a tax on salaries of non-residents payable by a corporation was imposed upon the corporation and treated the tax as in effect a tax on the corporation. * * *

"If the tax is an excise tax, and we hold that it is, it is entirely immaterial upon whom the burden of it ultimately falls. In a sales tax it falls, usually at least, upon the purchaser. In a stamp tax on deeds, it usually falls on the seller. In an inheritance tax, it falls on the recipient of the property. In the stock transfer tax above referred to it probably fell on the broker consummating the transfer. In a stamp tax on checks it falls on the drawer of the check. In none of the cases is it a personal property tax against the person upon whom the burden of it ultimately falls."

In the instant case the Supreme Court of Wisconsin reversed the position taken by it in its opinion on rehearing in the *Froedtert* case and held the assessment made by the Wisconsin State Tax Commission against the respondent unconstitutional upon the ground that the state had no jurisdiction to tax the declaration and receipt of the dividends here in question. Respondent submits that this decision of the Supreme Court of Wisconsin was clearly correct and in accord with the applicable decisions of this court. The best method of demonstrating the truth of this contention is to consider in order the various jurisdictional bases upon which petitioners have asserted or might assert that such jurisdiction rests and to demonstrate each to be without foundation.

- (a) The State of Wisconsin may not levy an excise tax upon a transaction which takes place beyond its borders.

The evidence is clear and undisputed that in declaring and paying the dividends sought to be taxed all of the necessary acts were performed by J. C. Penney Company in the State of New York, that the dividends were paid from general funds standing to its credit in New York banks and that no part of the funds so applied could be earmarked as Wisconsin earnings or even as earnings for any particular year, and that J. C. Penney Company per-

formed no act in connection with the payment of such dividends in the State of Wisconsin (R. 29, 30, 31, 32, 35, 41). A very small part of the total dividends paid by J. C. Penney Company was mailed by it in New York to stockholders who received their mail in Wisconsin. This is the only "receipt" of dividends which might be said to have taken place in that state (R. 32, 33).

The decisions of this court clearly show the law to be that a state may not impose an excise tax upon a transaction which takes place beyond its borders.

The latest and most authoritative case upon the above proposition is that of *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938). In this case it appeared that the Connecticut General Life Insurance Company was a Connecticut corporation licensed to do business in California. In addition to writing insurance in that state it did a reinsurance business with other corporations licensed to do business in California, reinsuring them against loss on policies of life insurance effected by them in California and issued to residents of that state. Such reinsurance contracts were entered into in Connecticut and the premiums and losses, if any, were paid in that state. The California taxing authorities contended that the reinsurance premiums received by the Connecticut General Life Insurance Company in Connecticut were subject to the California franchise tax upon insurance companies, which imposed a tax of 2.6% on gross premiums received. The Supreme Court of California upheld this contention but its judgment was reversed by this Court which held that the tax might not constitutionally be applied to premiums "received" in Connecticut. In the course of its opinion this Court said at page 80:

"Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *New York Life*

Insurance Co. v. Head, 234 U. S. 149; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; *Compania De Tabacos v. Collector*, 275 U. S. 87; *Home Insurance Co. v. Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *Boseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co. v. Graves*, 274 N. Y. 312; compare *Provident Savings Life Insurance Society v. Kentucky*, 239 U. S. 103."

The Supreme Court of Wisconsin placed its chief reliance upon this case in altering the position taken by it in its opinion on rehearing in the *Froedtert* case.

In the case of *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937), this court in discussing the application of a West Virginia gross receipts tax to certain construction work performed by the plaintiff company said:

"* * * Unless the activities which are the subject of the tax were carried on within the territorial limits of West Virginia, the state had no jurisdiction to impose the tax * * *" (p. 138).

For other cases to the same general effect see: *Provident Savings Association v. Kentucky*, 239 U. S. 103 (1915), and *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922).

It is obvious that unless it may be sustained upon some basis of jurisdiction other than territorial jurisdiction over the situs of the transaction, the tax is unconstitutional as applied to the dividends here at issue. "

(b) Jurisdiction to tax may not be based upon the ground that the privilege exercised was granted by the State of Wisconsin.

The privilege of a corporation of declaring and paying dividends is conferred by its charter and by-laws and is derived solely from the law of the state of incorporation. In

Union & New Haven Trust Co. v. Watrous, 109 Conn. 268, 146 Atl. 727 (1929), the court said:

"* * * Since the corporations in question are New York corporations, it follows that the laws of that state are the sole authority for their corporate act of separating a given sum from the corporate assets and setting it apart for the stockholder. This act of separation is one which fundamentally involves the internal policy and management of the corporation" (p. 730).

See also: *Turner v. Goetz*, 184 Wis. 508, 199 N. W. 155 (1924). J. C. Penney Company is a Delaware corporation and exercises its privilege of paying dividends pursuant to Section 34 of the General Corporation Law of that state which provides:

"The directors of every corporation created under this Chapter subject to any restrictions contained in its Certificate of Incorporation, shall have power to declare and pay dividends * * *." (R. 38).

It is obvious that a privilege conferred by the laws of the State of Delaware cannot be the basis of a taxing jurisdiction in the State of Wisconsin.

- (c) The State of Wisconsin may not as a price of doing local business require a corporation to submit to the imposition of taxes upon corporate activities elsewhere which would otherwise be beyond its jurisdiction.

The above proposition is too well settled to require any extensive citation of authorities. See, however, *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938); *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 (1910); *International Paper Co. v. Massachusetts*, 246 U. S. 135 (1918).

It should be further noted that no attempt has been made to employ this basis of jurisdiction either by the Wis-

consin Legislature or the state Supreme Court. The tax is an excise imposed upon the transaction of declaring and receiving dividends. It is not levied as a price for the privilege of doing local business nor for the earning of income within the state, a separate tax upon which has been paid (R. 27).

The brief filed by petitioners contains a discussion as to whether the tax may be said to be levied upon the exercise of a privilege or a right. There is, of course, no question but what either may upon appropriate occasion properly be the subject of a tax. In the instant case, however, if the tax be construed as upon the exercise of a right, it is invalid because the exercise occurs beyond the territorial jurisdiction of Wisconsin; if it be construed as upon the exercise of a privilege, it is invalid because the privilege is not one granted by the State of Wisconsin. The petitioners substantially concede this saying at page 48 of their brief:

“* * * It is perfectly evident that the State of Wisconsin may not, as an independent basis of taxation, tax the exercise of a privilege which it does not grant. Neither may it, as an independent basis of taxation, impose a tax upon a transaction which occurs without its territorial jurisdiction.”

In order to avoid the dilemma so presented, however, they argue, and this, as we construe their brief as a whole, is the sole basis of jurisdiction urged by petitioners:

(a) that, if a state has jurisdiction to tax property, it may impose a tax upon the devolution of such property, and

(b) that the State of Wisconsin has jurisdiction to tax the declaration and receipt of the dividends here involved because a part of the surplus from which they were paid was originally derived from Wisconsin earnings,

(pp. 28, 29, 30, 31, 48, 50, 51 of petitioners' brief). It is necessary for petitioners to prevail upon both of these propositions in order to sustain the validity of the assess-

ment here at issue. It is respondent's contention, however, that neither is sound as applied to the facts of the instant case.

- (d) The fact that a state may be able to establish a constructive or business situs of intangibles for the purpose of an inheritance or property tax does not give it power to impose an excise tax upon a transaction involving such property when no physical part of the transaction takes place within the state.

The nature of the tax here involved as an excise tax upon a transaction has been previously referred to. The Supreme Court of Wisconsin in its opinions in *State ex rel. Froedtert G. & M. Co. v. Tax Commission*, 221 Wis. 225 (1936), compared it among other things to a stock transfer tax (p. 240) citing *Hatch v. Reardon*, 204 U. S. 152 (1907), to a stamp tax on deeds and a tax on the right to transfer funds in banks by check (p. 231).

Generally speaking an excise tax is levied upon the privilege of acting within a state or taking some benefit from its law. (See Beale, *Conflict of Laws*, p. 621). Cooley in his work on *Taxation* defines them as "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations and upon corporate privileges" (Fourth Edition, p. 127). Although there are some exceptions, the distinction generally recognized between an excise tax and a property tax is that the excise tax is said to be upon the act, transaction or use rather than upon property. The Supreme Court of Wisconsin recognized this distinction in the *Froedtert* case when it answered a contention that the tax was invalid as a tax upon property by saying:

"If the tax were considered as a property tax, or as a tax imposed on the non-resident, this would be correct. But the tax is an excise tax, a tax on the transaction involved * * *". (p. 235).

Accordingly, the situs of such act, transaction or use; not of the property determines state jurisdiction to tax. See: *People ex rel. Hatch v. Reardon*, 184 N. Y. 431 (1906), *affd.* 204 U. S. 152; *Graniteville Mfg. Co. v. Query*, 283 U. S. 376 (1931); *Bickell v. Lee*, 5 Fed. Supp. 720, (D. C. Fla. 1, 1934). Modified 292 U. S. 415; *In re Paul's Estate*, 165 N. Y. Supp. 413 (Surr. Ct. N. Y. Co. 1917), *affd.* no. op. App. Div. 1st Dept. 167 Supp. 1117.

In *Hatch v. Reardon*, 204 U. S. 152, the seller and also the purchaser of certain corporate stock were residents of Connecticut. The contention was raised that the State of New York had no jurisdiction to levy a stock transfer tax even though the transaction took place there because the situs of the property sold was not within the state. The opinion of this court rejected this argument without much discussion. The opinion of Judge Vann of the New York Court of Appeals (*People v. Reardon*, 184 N. Y. 431) contains some language quite pertinent to the instant controversy, however. He said at page 448:

"Fourth. It is insisted that a tax on the transfer of stock certificates issued by a foreign corporation and owned by a non-resident, although made within this state, is virtually a tax on property without the jurisdiction of the state.

"This position is founded on the theory that the shares of capital stock of a corporation represent its property and if that property is not within the state the shares are not taxable here unless the owner resides here. The tax, however, is not on property, but on the sale of property, or on a particular kind of contract when made within this state. The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the state, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller to pay the tax when the contract to sell is made, and it is en-

forced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.

"The question is whether the state has jurisdiction to impose a tax on a certain class of contracts when made within its territorial limits? Jurisdiction over the persons who make the contract does not depend on their residence, but on their presence within the state when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here. The fiction of the common law, *mobilia sequuntur personam*, has no foundation in the Constitution and does not control the legislature, which rejects or adopts it at will as applied to the subject of taxation. When two citizens of Connecticut come into this state and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the state, and is as binding on them as if they resided in the state. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less. The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the state they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the state it is subject to

taxation by the state. This necessarily follows from the power of the state over the subject of taxation. It has power to tax all property within its territory, all business done and all contracts made within that territory, provided they are not protected as Federal agencies, whether the property is owned or the business is done or the contracts are made by residents or non-residents. 'It has never been questioned that the Legislature can impose a tax on all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.' (*Matter of McPherson*, 104 N. Y. 306, 317).

"We think such specific or excise taxes are laid upon privileges rather than on property. (*Orr v. Gilman*, 183 U. S. 278, 289; *Clark v. Titusville*, 184 U. S. 329; *Thomas v. United States*, 192 U. S. 363; *Foppiano v. Speed*, 199 U. S. 501, 520). This was distinctly held in the *Thomas* case, and necessarily so held, for if a tax on certificates is a tax on property it is a direct tax requiring apportionment 'among the several states . . . according to their respective numbers' (Art. 1, § 2, par. 3). . . ."

If the rules suggested by the petitioners were sound, it would mean that an excise tax on withdrawals from New York bank accounts might be imposed by every state from which funds deposited in the bank were derived; it would mean that all such states might levy a sales tax upon transactions involving such funds. It would seem to require that any state from which earnings composing a part of the corporate surplus were drawn could levy a stock transfer tax. Certainly, it would mean that the states of domicile of the purchaser and seller might do so.

As previously stated the Supreme Court of Wisconsin held the Privilege Dividend Tax valid as to foreign corporations in its opinion on rehearing in the *Froedtert* case (221 Wis. 240). After again referring to the tax as a tax upon a transaction, and comparing the declaration of dividends to the transfer of stock the court continued (p. 242):

"* * * Of course, it does not follow that the state may impose the instant tax in case of a foreign cor-

poration because it may impose it in case of a domestic corporation. The declaring of a dividend by the foreign corporation and the transmittal of it would be done without the taxing state, and neither would be a transaction within it, nor would the funds out of which the dividend was paid be located within the taxing state at the time of payment. But the fact that the earnings made by a foreign corporation within a state are not located therein does not prevent the state wherein they are earned from taxing the earnings, nor from enforcing the collection of the tax. No more should the circumstances above stated prevent the state from imposing the instant tax or enforcing its collection. The case of *First National Bank v. Maine*, *supra*, also states that the United States Supreme Court has reserved the question whether stock, bonds, etc. owned by a non-resident may by reason of their use within a state, acquire such a situs within the state as to make them subject to an inheritance tax. By implication the question whether they may not be so used as to acquire a situs for other forms of transfer tax is also reserved; and so is the question whether the dividends involved in the instant transfer tax, which have been earned within the state, have not such a constructive situs within this state as to render them subject to the tax imposed by the instant statute. . . .

" . . . We perceive no more difficulty in taxing the transfer of dividends of foreign corporations attributable to business transacted or property situated within the state than in taxing such corporations on income so derived, and the validity of the latter form of taxation is established. *The fact that the dividends involved are derived from earnings within the state gives them a constructive situs within the state.* They are as readily collectible as is an income tax against a foreign corporation. Liability for payment of the tax is imposed upon the corporation. If such liability may be imposed there is no difficulty about collecting it, and there is no more difficulty about imposing the liability than existed in the *Travis* case, *supra*, about imposing upon the employer liability for income tax on salaries of non-residents earned within the state." (p. 245) (Emphasis ours).

Several thoughts are mingled in the above quotation. The first of these is that the tax is valid because it can be collected. This is obviously not sufficient as a basis for jurisdiction and it is hardly likely that the Wisconsin court seriously considered it to be such.

In addition, two other more or less related possible bases of jurisdiction are mentioned:

(1) that the surplus of a foreign corporation has a constructive or business situs in Wisconsin to the extent that it includes earnings originally derived from within that state;

(2) that the jurisdictional basis upon which an income tax upon foreign corporations which do business within the state is sustained is sufficient to support the instant tax.

These bases in substance amount to a legal analysis or breaking down into its component parts of petitioners' second proposition mentioned at page 18 hereof; that is, that the State of Wisconsin has jurisdiction to tax the declaration and receipt of the dividends here involved because a part of the surplus from which they were paid was derived from Wisconsin earnings.

We shall consider separately the two bases derived from the above quotation from the opinion on rehearing in the *Froedtert* case and demonstrate that neither is sufficient to support the application of the Privilege Dividend Tax to the facts of the instant case. The discussion of these will necessarily dispose of the petitioners' second proposition.

(c) The State of Wisconsin had no jurisdiction to tax the corporate surplus of J. C. Penney Company at the time the dividends in question were paid notwithstanding that such surplus may have included funds made up in part of earnings originally derived from Wisconsin or to tax the part thereof made up of such earnings.

Newark Fire Insurance Co. v. State Board, 307 U. S. 313 (1939), has done much to clarify the law with respect to

constructive or business situs of intangibles. This court said (p. 318):

"When a state exercises its sovereign power to create a private corporation, that corporation becomes a citizen, and domiciled in the jurisdiction, of its creator. There it must dwell. The dominion of the state over its creature is complete. In accordance with the ordinary recognition of the rule of *mobilia sequuntur personam* to determine the taxable situs of intangible personalty, the presumption is that such property is taxable by the state of the corporation's origin."

The court continued at page 319:

"There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state. . . ."

"Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. . . ."

" . . . To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity. The facts presented by this record fall far short of this requirement." (p. 321).

The facts there relied upon by petitioners to establish business situs in New York but thus adjudged insufficient by this court were:

" . . . It is stipulated that a registered office is maintained in Newark, New Jersey, together with such books as the law required to be kept within the state. The only business carried on in this Newark office is a local or regional claim and underwriting department for Essex and three other counties. No executive officer is there and reports are sent to the New York office. The stipulation further shows that the company's executive officers and its executive

office are located at 150 William Street, New York City. The general accounts of the company are kept in the office in New York City. The general accounting, underwriting and executive offices of the company are all located at the main office at 150 William Street, New York City. All cash and securities of the company are located there or in banks in that City or in other banks outside of the State of New Jersey, with the exception of the sum of \$6,425.32 on deposit in New Jersey banks. All of the general affairs of the company are conducted at the main office in New York City and have been so conducted there since appellant moved its main office from Newark six years ago. No personal property tax is paid in New York. The company does pay there a franchise tax based upon premiums." (p. 316).

The above case demonstrates that the concept of business situs is no longer the vague concept the Supreme Court of Wisconsin seemed to consider it in its opinion on the rehearing of *Wisconsin ex rel. Froedtert G. & M. Co. v. Tax Commission*, 221 Wis. 240. It is susceptible of more or less exact definition and the facts upon which an alleged business situs is based must be shown with particularity if the presumption favoring domiciliary taxation is to be rebutted.

In the instant case the record discloses that funds consisting of the proceeds of sales of merchandise in Wisconsin (and in other states) not needed to meet local payrolls, rents, advertising and other local expenses are deposited to the general credit of the respondent in New York banks (R. 29). The funds so deposited are used to pay salaries, general overhead of the New York office, accounts payable for merchandise purchased and taxes. Dividends are also paid from these New York bank accounts (R. 29). The funds after leaving Wisconsin completely lose their identity as having been derived from any particular source (R. 29) and there is no one in Wisconsin who has anything to do with them (R. 30).

It is possible that these funds so deposited and used gained a business situs in New York, since the activities of

the company might conceivably be said to be sufficient to give it a commercial domicile there under the rule laid down in *Wheeling Steel Corp. v. Fox*, 298 U. S. 193 (1936). There is nothing in the facts of this case, however, except the fact of partial original derivation from Wisconsin upon which to base an alleged business situs in that state of the New York bank accounts used to pay the dividends here involved. This must necessarily be insufficient since in the *Newark Fire Insurance Co.* case the greater part of the corporate income must have been derived from outside of the State of New Jersey as it affirmatively appeared that the only business office of the company in New Jersey was a local office which handled the business of four New Jersey counties. This was adjudged to be insufficient to establish a business situs of the corporate intangibles outside of New Jersey.

We know of no case which indicates that original derivation of earnings alone is or might be sufficient to give bank accounts containing them a tax situs in the state of derivation and many which affirmatively indicate it is not. As previously stated, the Supreme Court of Wisconsin in changing its conclusion with respect to the validity of the Privilege Dividend Tax as applied to foreign corporations relied upon *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938), the facts of which are set forth at page 15 hereof. In that case the attorneys for the State of California argued that the state had jurisdiction to tax the receipt in Connecticut of premiums on reinsurance paid by other corporations licensed to do business in California to the plaintiff with respect to California risks because the reinsurance transactions were so related to business carried on by the Connecticut General Life Insurance Company in California as to be a part of it and because in any case no injustice was done since the state allowed a deduction to the original insurers for the amount of the reinsurance. This court rejected that contention saying:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amend-

ment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194; *New York Life Insurance Co. v. Head*, 234 U. S. 149; *New York Life Insurance Co. v. Dodge*, 246 U. S. 357; *St. Louis Compress Co. v. Arkansas*, 260 U. S. 346; *Compania General De Tabacos v. Collector*, 275 U. S. 87; *Home Insurance Co. v. Dick*, 281 U. S. 397; *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U. S. 143; *Boseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196; *People ex rel. Sea Insurance Co. v. Graves*, 274 N. Y. 312; 8 N. E. (2d) 872; cf. *Provident Savings Life Assurance Society v. Kentucky*, 239 U. S. 103. It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. *Connecticut General Life Insurance Co. v. Johnson*, *supra*, 87; cf. *Morris & Co. v. Skandinavia Insurance Co.*, 279 U. S. 405, 408. Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by

companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of these acts was not dependent upon any privilege or authority granted by it, and California law afforded to them no protection." (p. 80).

It is submitted that the above language is entirely in point. Point C of the petitioners' brief is devoted to an attempt to distinguish the *Connecticut General* case and states as a sort of a summary that the State of California was not permitted to tax business transacted in another state (p. 45). Petitioners then quote from the dissenting opinion in the instant case of Justice Fowler of the Supreme Court of Wisconsin, who said "the declaration of the instant dividend was connected with, was incidental to, related back to, the business conducted in Wisconsin on the earnings of which the tax was computed * * *".

The issue presented, of course, is whether the payment and receipt of the dividends here involved had any more connection with the earning of income in Wisconsin than the receipt of premiums in Connecticut had to do with original risks in California, the original insurance of them by other companies in California, or the general business conducted within the state by the Connecticut General Life Insurance Company. There seems little object in our going into detail upon this point as the considerations involved are self-evident. We might note in passing, however, that the funds used by the other insurance companies in paying the premiums on reinsurance could certainly be as logically identified with funds received from the original payments with respect to California risks as the dividends in the instant case with Wisconsin earnings.

As indicated by the Supreme Court of Wisconsin, the facts involved in *Connecticut General Life Insurance Co. v. Johnson*, supra, would seem to present a stronger case for the validity of the tax than those of the instant one. In

addition to the reason given by that court it should be noted that in the *Connecticut General* case it appeared that the California court had construed the tax to be "a franchise tax exacted for the privilege of doing business" in the state (303 U. S. 79). The substance of this Court's holding must have been that the receipt of reinsurance premiums in California was not sufficiently related to California business to justify the state's including the tax upon it as a part of the measure of such business. See *Equitable Life Society v. Pennsylvania*, 238 U. S. 143 (1915). The instant tax must stand or fall upon the validity of an effort to tax directly a transaction occurring outside of the state and may not claim the possible advantage that the California tax had of being nominally levied upon the local business which was actually transacted by the Connecticut General Life Insurance Company.

In *Provident Savings Association v. Kentucky*, 239 U. S. 103 (1915), the State of Kentucky levied a franchise tax upon insurance companies for the privilege of doing business in the state which was based upon a percentage of premiums received. The plaintiff, a New York corporation, ceased doing business in the state but continued to receive premiums from Kentucky residents with respect to policies previously executed. This Court held that the tax could not be applied to the plaintiff because it was not enjoying the privilege taxed, saying at page 112:

"The present case thus differs from that of *Equitable Life Assurance Society v. Pennsylvania*, 238 U. S. 143. It was not disputed that the Equitable Company was actually doing business in Pennsylvania. See *Commonwealth v. Equitable Life Assurance Society*, 239 Pa. St. 288, 293. The question was as to the permissible measure of a tax exacted for a privilege admittedly exercised. As this court said: 'The tax is a tax upon a privilege actually used. The only question concerns the mode of measuring the tax.' 238 U. S. 147. In the present case it is not the measure of the tax for doing business, but the very basis of the tax—that is, whether the Company

was doing business within the State—that is in controversy.

“Assuming this to be the point in dispute, the question at once arises whether the matter is reviewable in this court. And we cannot doubt that the question whether the State is taxing a foreign corporation for a privilege not granted, that is, whether the acts done by the corporation at the time to which the tax relates are of such a nature as to subject it to the local authority upon the ground that it is doing acts which can only be done with the permission of that authority must be regarded as a Federal question. Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment (*Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385, 398; *Del., Lack. & West. R. R. v. Pennsylvania*, 198 U. S. 341, 358; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 209); and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the acts with respect to which the State exercises the taxing power must be considered when the constitutional protection against the transgression of jurisdictional limits is invoked.”

Respondent submits that the *Provident Savings Association* case, *supra*, is very closely in point. If a tax upon doing business outside of the state is invalid although measured by premiums received from within the state, it is difficult to see how a tax upon the declaration and receipt of dividends outside of the state can be valid though the surplus from which they were paid may have included some income earned within the state.

Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930), is quite close upon its facts. In this case a resident of Illinois died in that state owning a majority of the stock of a South Carolina corporation and holding obligations of that corporation in the sum of \$64,672.00 for declared and unpaid dividends and \$555,864.22 for advances to the cor-

poration. The State of South Carolina attempted to impose its inheritance tax upon the unpaid dividends and other indebtedness claiming jurisdiction to tax upon the ground that the debtor was a domestic corporation and that the dividends and indebtedness thereby acquired a business situs within the state. The Supreme Court rejected this argument and held that the tax was unconstitutional as to both.

This case involved dividends declared by a South Carolina corporation engaged in business in the state, which so far as the record on appeal shows, derived its income from property and business operations in South Carolina. Notwithstanding the fact that the corporation's income used to pay the dividends in question came from within South Carolina, the court held that only the stockholder's domicile had the right to tax the devolution of the dividends from the decedent to his legatees. In answering the state's argument that the dividends and debt had a constructive situs in South Carolina, this Court said at page 8: "The conclusion that debts have thus acquired a business situs must have evidence to support it; * * *." The fact that the corporation was in South Carolina, its books were there and that its dividends were presumably earned and declared there was not sufficient to give them a constructive situs within that state. How then can it be urged that the fact that respondent's corporate surplus may have included funds originally derived from Wisconsin gave it or dividends subsequently paid from it a constructive situs there? The taxes are different but both are imposed upon the devolution of title to income, a part of which came from within the state seeking to impose the tax.

Rhode Island Trust Co. v. Doughton, 270 U. S. 69 (1926), should also be considered in connection with the foregoing cases since it indicates that the fact that the Privilege Dividend Tax contains a formula pursuant to which only income presumed to have been originally derived from within the state is made subject to tax does not save the law since the surplus in which it is merged at the time of imposition of the tax has no situs in Wisconsin.

The facts as shown by the record are insufficient to rebut the presumption favoring taxation at the domicile only. The language quoted from the *Connecticut General Life Insurance Co.* case is equally applicable here. The validity of a tax is to be "ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state." A tax " * * * is not converted into a valid exaction merely because a corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax * * *". There is no authority for the addition by petitioners of the state of original derivation to the state of domicile and the state of business situs as one of the list of states possessing jurisdiction to tax intangibles.

- (f) **The Privilege Dividend Tax can not be sustained upon the same jurisdictional basis as an income tax upon foreign corporations which do business within the state.**

This topic is closely related to and perhaps should logically be regarded as a part of the discussion just concluded. It has seemed, however, that by treating it under a separate heading we might have more latitude in analyzing the differences between the instant tax and an income tax without destroying the inferential bearing of the argument here presented upon the constructive or business situs issue.

There is, of course, no question but what Wisconsin can impose an income tax upon foreign corporations which do business in that state. The Privilege Dividend Tax is not an income tax, however. It is an excise upon "the payment and receipt of dividends". There is an obvious difference between the two types of tax which is extremely important from the point of view of jurisdiction to tax. The *object* upon which the Privilege Dividend Tax is imposed is the *declaration and receipt* of dividends, which under the circumstances of this case does not take place in Wisconsin. In the case of an income tax, on the other hand, the object

of the tax is the earning of income within the state; it accrues as such income is earned and J. C. Penney Company has already paid a tax upon the income which petitioners now assert has become a part of the dividends here involved and by reason of which they seek to subject the payment and receipt of such dividends to tax (R. 27).

The difference between the two cases may best be illustrated by the use of a case which we feel presents substantially the same question. If an automobile is manufactured in Wisconsin, that state may certainly levy an excise tax upon its manufacture, *Hope Gas Co. v. Hall*, 274 U. S. 284 (1926); but, if the company manufacturing the automobile ships it to New York, places it in its salesroom and ultimately sells and delivers it to a New York customer, it could hardly be claimed that the automobile had such constructive situs in Wisconsin by reason of its manufacture as to subject it to a retail sales tax in that state. See *Adams Mfg. Co. v. Storen*, 304 U. S. 307, at p. 313 (1938), and *Delaware L. & W. R. R. Co. v. Pennsylvania*, 198 U. S. 341 (1905).

The hypothetical case suggested clearly brings out the difference between a tax upon the earning of income and a tax upon the payment and receipt of dividends involving income previously earned. In the case of a non-resident or foreign corporation the basis of jurisdiction to levy an income tax is that the income *accrued* in the state. As the income is earned, liability to pay the tax is incurred. As income may be said to represent a continuous flow, the calculation of the tax is simply deferred until a given date for convenience in measurement. The fact that the income may have been withdrawn from the state before this calculation date arrives is, of course, entirely immaterial. This does not mean, however, that the tax may be regarded as being imposed upon a proportionate part of the corporate surplus as of the return day. It simply means that the corporation earning the income must pay the state's "meterage" charge or render its property within the state subject to execution.

In connection with the argument that in the instant case Wisconsin income had left the state and acquired a situs elsewhere before the declaration and receipt of the dividends here in question, it should be borne in mind that, although subsection (4) of the statute contains a presumption that dividends of corporations doing business both inside and outside of the state are paid from earnings attributable to Wisconsin for the preceding year, the tax is not limited to cases in which this presumption is not rebutted. Under the law, it would appear that, even though a corporate surplus had been accumulated for twenty years and no Wisconsin earnings realized during that period, the State Tax Commission would still be obliged to determine what part of a dividend paid by such corporation consisted of funds attributable to Wisconsin earnings, and assess a tax thereon. The instant case contains this consideration in some degree since, as hereinafter shown, at p. 47, the Tax Commission has presumed that in its 1936 dividends respondent paid the sum of \$690,193.36 out of 1935 Wisconsin income, whereas its total 1935 income from Wisconsin was only \$587,001.00.

The analogy which petitioners suggest exists between succession taxes and the instant case (p. 30) suggests another interesting comparison. In *Curry v. McCannless*, 307 U. S. 350, the decedent, a Tennessee resident, set up a trust with an Alabama trust company, reserving the right to dispose of the corpus by her will. This court held that both Tennessee and Alabama had jurisdiction to impose a succession tax. The facts of the case do not disclose from whence the original earnings represented by the intangibles in the trust may have been derived. However, it seems hardly likely that each state from which a part of the earnings so represented may have originally been derived would have been able to tax the succession to the extent of such part. We know of no decision which suggests that such a tax might be valid and *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 and *Rhode Island Trust Co. v. Doughton*, 270 U. S. 69, are conclusive that it would not be.

Petitioners advanced the contention below that the tax is similar to a corporate income tax and should be treated as such notwithstanding the fact that the legislature imposed it upon the "privilege of declaring and receiving dividends * * *" and that the Supreme Court of Wisconsin had previously construed it as "an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders" (221 Wis. 233). That court instead of altering its previous construction of the law expressly reaffirmed it (233 Wis. 291). This Court is bound by the construction given the law by the Supreme Court of Wisconsin. *Knights of Pythias v. Meyer*, 265 U. S. 30 (1924); *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509 (1933). Petitioners have not renewed the above contention in their brief addressed to this Court and, therefore, are no doubt foreclosed from reasserting it.

As a part of our argument in asserting that the tax may not be sustained upon the same basis as an income tax, however, it has seemed desirable to deal briefly with several considerations which render it clear that the incidence of the tax is upon the declaration and receipt of dividends and not upon the earning of income.

In *American Mfg. Co. v. St. Louis*, 250 U. S. 459 (1919), a tax upon manufacturing was measured by the amount of sales made. The taxpayer argued that the incidence of the tax was upon the sale rather than the manufacturing because it would be possible to manufacture goods to an unlimited extent and yet no tax would be due if they were not sold. This Court rejected the contention saying:

"* * * it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The differ-

ence is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods." (p. 464)

"Subsequent cases would seem to require that in a case of this type the value at the time of manufacture be used as the measure of the tax and not the subsequent sale value. *Hepe Gas Co. v. Hall*, 274 U. S. 284 (1926).

It is clear that under the test discussed in the *American Mfg. Co.* case the incidence of the Privilege Dividend tax is, as the statute says it is, upon the declaration and receipt of dividends. While in the case of manufacturing, it is hardly possible to conceive that any material portion of goods manufactured will not be sold, it is indeed most likely that a very large portion of income realized in one state by a corporation doing business in several will never be paid out in dividends.

In the first place net income is always added to the surplus of the corporation. The corporation may wish to expand in which case the surplus is invested in definite capital assets. Indeed, by an increase in par value of the shares or declaration of stock dividends, such surplus may find its way into the capital account of the corporation and no longer be available at all for dividends.

It is customary for most corporations to carry at least a moderate surplus from the net income in good years for the purpose of meeting losses during bad ones. If the surplus is lost in later bad years, it, of course, may not be paid out in dividends. Again, if the capital of the corporation is impaired the net income must be used to make up the deficit in this account and may not be used for dividends.

Doubtless, there are also cases in which corporations have very profitable operations in Wisconsin from which they derive large incomes and unprofitable business elsewhere through which they lose the income earned in Wis-

consin. It is self-evident that two corporations might each have net incomes in Wisconsin in a given year of \$100,000 and one might pay a Privilege Dividend Tax of \$2,500 and the other none at all.

There is another important distinction between the operation of the Privilege Dividend Tax and that of a corporate franchise or income tax. Income and franchise taxes are a part of the corporate expense; the Privilege Dividend Tax is not. If, because of taxes the net income of a corporation having both preferred and common stock outstanding is insufficient to pay dividends upon both issues in full, those upon the preferred stock are paid and those upon the common reduced or passed. In the case of the Privilege Dividend Tax the amount of the tax is deducted directly from the dividends payable to both preferred and common stockholders. This would indicate conclusively that the incidence of the tax is upon the dividend transaction or upon the corporate stockholders and not upon the transaction of corporate business or the realization of corporate income.

From the foregoing it is apparent that there is no such close connection between the earning of income in Wisconsin by a foreign corporation which does business both within and without the state and its payment of dividends as to render a tax upon the one a tax upon the other. The language employed by this Court in the recent case of *Colorado National Bank of Denver v. Belford*, 310 U. S. 41 (1940), is exactly in point.

"The determination of the state court as to the incidence of the tax has great weight with us and, when it follows logically the language of the act, as here, is controlling." (p. 52).

A careful reading of the Privilege Dividend Tax Law discloses that considered from the point of view of income tax analogies, it is much more similar to an income tax upon stockholders than upon the corporation. Part of the subject of tax is the receipt of income by stockholders. The corporation is required by Subsection 3 of the law to deduct the

tax from the stockholders' dividends. In the *Froedtert* case the Supreme Court of Wisconsin appeared to be influenced by this likeness since in discussing the tax it referred to *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920), a case involving an income tax collectible at the source.

Petitioners have advanced no contention that the tax should be sustained as an income tax upon stockholders and it would appear to be too clear to admit of serious controversy that the State of Wisconsin may not impose an income tax upon respondent's non-resident stockholders. See: *Domenech v. United Porto Rican Sugar Co.*, 62 Fed. 2d 562 (C. C. A. 1st 1932) cert. den. 289 U. S. 739.

An effort to do this would in substance amount to a disregard of respondent's corporate entity and it is clear that this may not be done. *Rhode Island Trust Company v. Doughton*, 270 U. S. 69; *Klein v. Board of Supervisors*, 282 U. S. 19 (1930); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1. It is the policy of the State of Wisconsin to respect the corporate entity for tax purposes. *Ellinger v. Wisconsin State Tax Commission*, 229 Wis. 71, 281 N. W. 701 (1938). The State of Wisconsin certainly should not be permitted to disregard respondent's corporate entity in the instant case after having imposed an income tax upon respondent based upon the conception of respondent as a separate entity.

Any further consideration of possible similarities of the Privilege Dividend Tax to income taxes seems futile, since the Supreme Court of Wisconsin has conclusively construed it otherwise and no contrary assertion has been advanced by petitioners. The acknowledged power of the State of Wisconsin to impose an income tax upon foreign corporations doing business within the state does not furnish a basis of jurisdiction sufficient to support the tax here under consideration.

(g) The cases and statutes referred to in petitioners' brief are not similar and, therefore, have no bearing upon the instant case.

It may appear from the foregoing argument that respondent has to some extent failed to join issue with petitioners. Petitioners' brief does not make this overly easy to do as it has been difficult to determine exactly what the principles of jurisdiction are upon which they rely. It is fairly apparent, however, from their citation of *Bullen v. Wisconsin*, 240 U. S. 625 (1916), *Curry v. McCanless*, 307 U. S. 357 (1939), and *Graves v. Elliott*, 307 U. S. 383 (1939), that their argument principally rests upon an attempt to draw some analogy from estate tax cases, though a thorough going application of the rules governing such taxes would certainly indicate that the instant tax is unconstitutional. *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930); *Rhode Island Trust Company v. Doughton*, 270 U. S. 69 (1926).

In all of the three cases first referred to above a decedent domiciled in one state set up a trust of intangibles with a trustee in a second state. In two of the cases the decedent reserved a power of revocation; in the third, a power to dispose of the corpus by will. In these cases this Court held that both the state of the decedent's domicile and the state of the seat of the trust might impose a succession tax. These cases involve taxation by the state of domicile and the state in which a trust is conducted, each of which is a sound basis of jurisdiction. Neither of these bases is present in the instant case, however.

Petitioners have evidently cited the above cases as a basis of a possible analogy rather than because of their exact holdings. The attempted analogy, however, simply serves to emphasize the essential similarity of the Privilege Dividend Tax to an income tax upon stockholders as discussed at page 39 hereof. It has seemed fruitless to us to conduct *ab initio* an analysis of the various considerations which render it reasonable for a state to impose a tax in

one situation and not in another because the principles which petitioners would have to establish in order to support their attempted analogy are entirely inconsistent with numerous decisions of this Court. We have accordingly referred to and discussed those decisions of this and other courts which have established the principles in the field of state jurisdiction to tax which we deem applicable instead of attempting a critical analysis of the subject.

Petitioners say at page 53 of their brief:

"The fact that a tax is measured by the 'amount of dividends declared' can not be made the basis of a tenable constitutional objection to a taxing act imposing a tax so measured. The use of 'amount of dividends declared' as the measure of a tax is not only proper, but just and equitable. Measuring of taxes by dividends paid is not new but is supported by precedent of long standing * * *."

A careful examination discloses that none of the statutes referred to by petitioners are sufficiently similar to the instant one to be of any assistance to petitioners' case. The first statute cited is Section 10, Chapter 3902, Laws of Pennsylvania of 1814. This law provided for the division of the state into banking districts and established a manner of incorporation of state banks. Section 10 of the act required banks so incorporated to pay a tax of 6% on dividends declared and provided that the charter of any bank which failed to pay the tax should be forfeited. This provision was obviously applicable only to banks incorporated under the act in question which were, of course, Pennsylvania corporations. It is hardly possible that the question could have arisen with respect to foreign banks since at that time there seems to have been a statute prohibiting banks incorporated in other states from doing business in Pennsylvania. See *Laws of Pennsylvania 1700-1846*, Dunlop, p. 203 (Chapter CLXV [Passed March 28, 1808]).

The second Pennsylvania statute referred to is Section 1, Act. No. 232, Laws of Pennsylvania, 1940. This section was obviously part of a general property tax law as may be discerned from an examination of its context and must be regarded as having imposed such a tax either upon the corporate property or upon the intangible property of the stockholder represented by the capital stock. The same observation holds true with respect to the three other Pennsylvania statutes cited. It will be noted that they provided for the imposition of an alternative form of tax based upon valuation in the event no dividends were paid. The Pennsylvania cases cited by petitioners support the above construction of these laws. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1890). As so construed they obviously can have no bearing upon the instant case.

Petitioners state that the constitutionality of the Pennsylvania statutes seems to have been assumed. We see no reason for questioning their constitutionality if they be construed to have imposed a tax upon the property of the corporation. On the other hand, if their proper construction is that they imposed a property tax upon the intangible interest of the stockholder, they certainly would be invalid if applied to non-resident stockholders of foreign corporations. *State Tax on Foreign Held Bonds*, 15 Wall. (82 U. S.) 300 (1872); *First National Bank of Boston v. Maine*, 284 U. S. 312 (1932); *Farmers Loan and Trust Company v. Minnesota*, 280 U. S. 204 (1930); *Rhode Island Trust Co. v. Doughton*, 270 U. S. 69 (1926).

Respondent took the alternative position before the Wisconsin courts that the law here involved should be construed as in substance levying a property tax either upon the stock or upon the dividends belonging to respondent's stockholders and that it is invalid as to stockholders residing outside of the State of Wisconsin. See, *Dawson v. Kentucky Distilleries and Warehouse Company*, 255 U. S. 288 (1920) and *Frick v. Pennsylvania*, 268 U. S. 473 (1924). Respondent renews that position at this time.

Petitioners cite several cases decided under Sections 182 and 186 of the New York Tax Law. Section 182 imposes a franchise tax on real estate corporations and Section 186 on water works, gas, electric, steam heating, light and power companies. These sections are a part of the New York franchise-income tax upon corporations which insofar as foreign corporations are concerned is imposed for the privilege of doing business in the state. Dividends paid are simply one of the items which are taken into account in calculating the amount of tax due. In addition to the fact that factors other than dividends paid must be considered in computing the franchise taxes referred to, they are distinguishable from the instant tax since the subject upon which they are imposed is the transaction of New York business which is certainly a proper subject. In this connection see: *Equitable Life Society v. Pennsylvania*, 238 U. S. 143 (1915); *Provident Savings Association v. Kentucky*, 239 U. S. 103 (1915), which indicate that a measure of tax which may be validly employed in connection with a proper subject of tax is insufficient to save a tax levied upon an improper subject. The foregoing observations are also sufficient to dispose of the New York franchise tax statutes involved in *Home Insurance Co. v. New York*, 134 U. S. 594 (1890) and *Horn Silver Mining Co. v. New York*, 143 U. S. 305 (1892).

The petitioners also cite several cases involving the Federal Civil War income tax law, one of the provisions of which required corporations to deduct the amount of an income tax from dividends paid to stockholders. The provision with respect to the deduction of the amount of tax from dividends was a part of a scheme for the measurement of income devised by Congress long before the adoption of the method used in the present law. The method employed was to tax the corporation with respect to funds going into each of the "corporate pockets" into which income might be put. Dividends were simply one of those named. *Railroad Co. v. Collector*, X Otto (100 U. S.) 595 (1879). The

law was a federal and not a state law, and the method of measurement of income was approximately fair. The differences between this tax and the instant tax imposed upon the payment and receipt of dividends are obvious.

From the foregoing analysis of the various statutes referred to by petitioners in which dividends were taken into consideration in calculating the taxes thereby imposed, it is plain that they furnish no authority tending to support the validity of the tax here under consideration.

As has been demonstrated above, the assessment made against the respondent cannot be sustained upon the ground that the transaction taxed took place within Wisconsin or that it involved the exercise of a privilege granted by that state. The Supreme Court of Wisconsin has construed the tax imposed as an excise tax upon a transaction and in the case of such a tax the situs of the subject matter of the transaction is immaterial. In any event the surplus from which the dividends here involved were paid had no situs for taxation in Wisconsin. Furthermore, we have shown that the tax may not be sustained upon the same jurisdictional basis as an income tax upon foreign corporations which do business within the state. The obligation to pay a tax upon its activities elsewhere may not be imposed upon the respondent as a price of doing local business and the State of Wisconsin has made no effort to do so. There is no other possible basis of jurisdiction upon which the Privilege Dividend Tax might be supported and it is accordingly clear that the Supreme Court of Wisconsin correctly applied the various decisions of this court construing the Fourteenth Amendment to the Constitution of the United States, in holding the instant assessment invalid.

POINT II.

The assessment here involved is further void because the tax was calculated pursuant to the statutory presumption that the dividends in question were paid from the previous year's income and contained an exactly proportionate part of the Wisconsin earnings for such year. Such presumption is plainly not in accord with the true facts and is, therefore, either rebutted or is void as arbitrary and unreasonable. If the true effect of such presumption is to establish a rule of substantive law requiring foreign corporations to declare their dividends from any particular source, such presumption amounts to an unconstitutional attempt to regulate the activities of foreign corporations outside the state.

Subsection 4 of the tax law contains the following presumption which was employed by the Tax Commission in computing the assessment here involved:

“(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and properly located within the state.”

In the instant case the presumption was applied as follows: The percentage of respondent's total income for the year previous to that in which each dividend was declared made up of Wisconsin earnings was first ascertained pursuant to the Wisconsin income tax formula. The total dollar value of dividends paid was then multiplied by such percentage. The result was considered the portion of the dividends attributable to Wisconsin earnings and subject to tax.

It would seem clear from the language of the statute that the presumption may be rebutted in some cases at least and is not to be treated as conclusive. Respondent contends that the presumption has been rebutted by the facts in the instant case and that the State Tax Commission erred in applying it. This contention was urged before the Supreme Court of Wisconsin but it failed to pass upon it. As it represents an additional ground for sustaining the result of the decision of that court, we are again urging it at this time.

Section 34 of the Delaware Corporation Law from which respondent derives its dividend paying powers is as follows:

"The directors of every corporation created under this chapter, subject to any restrictions contained in its certificate of incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with the provisions of Sections 14, 26, 27 and 28 of this chapter, or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year." (R. 38).

The following section of the Delaware Law provides:

"No corporation created under the provisions of this chapter, nor the directors thereof shall pay dividends upon any share of the corporation except

in accordance with the provisions of this chapter." Delaware Corporation Law, Sec. 35, Revised Code of Delaware, 1935, Sec. 2067.

At the end of the calendar year 1934 the respondent had a surplus of \$29,279,543.14; and at the end of 1935, a surplus of \$36,072,252.54 (R. 35). This surplus represented earnings accumulated by it and its predecessor company since 1916 from all of the forty-eight states (R. 41). Wisconsin earnings and earnings for particular calendar years entering into such surplus were not segregated and had lost their character as earnings from any particular source or year long before the dividends here involved were paid and it would be a Herculean task to figure what part of the surplus was attributable to Wisconsin stores (R. 29, 41, 42). The dividends sought to be taxed were all paid out of respondent's general surplus in accordance with resolutions which recited that they were declared "from the surplus of the company" (R. 35). As above noted it would have been unlawful for respondent to have paid the dividends in question from the presumed source.

These facts are certainly sufficient to rebut any presumption that respondent's stockholders received as dividends in either December 1935 or in the year 1936 an exactly proportionate part of respondent's Wisconsin earnings for the respective preceding year. Indeed, this would have been manifestly impossible for in 1936 respondent was "presumed" to have paid \$17,900,134.00 in dividends out of total 1935 earnings of \$15,223,478.00 (Ex. A, R. 47, 44). Under the formula used by the Wisconsin Income Tax Law, \$587,001.00 of respondent's 1935 income was treated as derived from within that state, yet in preparing the assessment here involved the State Tax Commission presumed that \$690,073.36 of 1936 dividends was paid from such sum (Exhibit A, R. 47, 44).

If the presumption is properly construed as a rebuttable one, it certainly must be deemed rebutted. On the other

hand, if it must be construed to require a finding of fact which is contrary to the undisputed facts in the record the presumption itself is unconstitutional as arbitrary and unreasonable. *Schlesinger v. Wisconsin*, 270 U. S. 230 (1926); *Heiner v. Donnan*, 285 U. S. 312 (1932).

The third possibility exists that the true purport of the law is that it directs foreign corporations which do business in the state to declare their dividends from a specific source; that is, that by being irrebuttable the presumption establishes a rule of substantive law. See: *U. S. v. Provident Trust Co.*, 291 U. S. 272, (1934) at p. 283. That this is the construction given to the law by the State Tax Commission is suggested by the fact that it refused to regard the presumption as rebutted by a specific corporate resolution inconsistent with it even though passed in accordance with the statutes of the state of incorporation. The Supreme Court of Wisconsin has thus far had no occasion to construe this presumption.

Even if the presumption be construed as establishing a rule of substantive law, it is invalid, however. As previously stated at page 17 hereof, the privilege of paying dividends is conferred and governed by the law of the state of incorporation. The State of Wisconsin certainly has no power to direct from which part of its surplus payment of dividends shall be made by a foreign corporation. *Modern Woodmen v. Mixer*, 267 U. S. 544 (1925); *Chandler v. Peketz*, 297 U. S. 609 (1936); *Converse v. Hamilton*, 224 U. S. 243 (1912) at p. 260. Any such attempt would be an unconstitutional interference with the privileges of a foreign corporation exercised beyond its jurisdiction. *New York Life Insurance Co. v. Head*, 234 U. S. 149 (1914); *Baldwin v. Seelig*, 294 U. S. 511 (1935).

The law of some one state must be competent to determine from what source corporate dividends shall be paid. In the instant case the Delaware law is that law.

To allow each of the forty-eight states to direct from what source a corporation shall pay dividends would breed chaos.

If the statutory presumption is rebuttable, the facts in the record are sufficient to rebut it. If it is irrebuttable, it is either void as being arbitrary and unreasonable or it establishes a rule of substantive law. If it establishes a rule of substantive law, however, such rule may not be applied to foreign corporations. In any case the presumption is inoperative as to the instant case and the assessment accordingly invalid.

Conclusion.

It must be apparent from the foregoing argument that the Supreme Court of Wisconsin correctly applied the applicable decisions of this court in holding the assessment here involved invalid. There can be no question but what the State of Wisconsin can impose a tax upon respondent's Wisconsin income and it has done so, thus deriving the revenue to which it is entitled by reason of respondent's earning of income within the state. If it chooses it no doubt may also levy a franchise tax for the privilege of doing business within the state. It may levy a property tax upon the tangible and intangible property of the respondent situated within the state. It may tax the various transactions in which respondent is engaged within the state by a sales, check or other type of transaction tax. Doubtless there are other types of tax which the state may properly impose under the existing principles of constitutional law. Surely these admittedly proper forms of taxation are sufficient to permit the state to meet its legitimate needs for revenue and to exact taxes reasonably related to the governmental protection which it affords. There can be no necessity for this court to alter the established law regarding state jurisdiction to tax and to sustain the principles underlying the instant tax. As has been above demonstrated, to do so would necessarily destroy in part the order which the Four-

teenth Amendment to the Constitution of the United States, and the decisions of this Court have thus far established in the field of state jurisdiction to tax.

The judgment of the Supreme Court of Wisconsin should be affirmed.

Respectfully submitted,

W. H. DANNAT PELL,
ROSWELL DEAN PINE, JR.,
G. BURGESS ELA,

Attorneys for Respondent.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1940

No. 46.

STATE OF WISCONSIN and ELMER E. BARLOW, as Com-
missioner of Taxation of the State of Wisconsin,
Petitioners,

vs.

J. C. PENNEY COMPANY, a Delaware Corporation,
Respondent.

PETITION OF RESPONDENT FOR REHEARING
AND
BRIEF IN SUPPORT THEREOF.

W. H. DANNAT PELL,
ROSWELL DEAN PINE, JR.,
G. BURGESS ELA,
Attorneys for Respondent.

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Supreme Court of the United States,
OCTOBER TERM, 1940.

No. 46.

STATE OF WISCONSIN and ELMER E.
BARLOW, as Commissioner of Tax-
ation of the State of Wisconsin,
Petitioners,
against

J. C. PENNEY COMPANY, a Delaware
Corporation,
Respondents.

PETITION FOR REHEARING.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES.

Comes now the above named J. C. Penney Company,
a Delaware corporation, and presents this, its petition for
a rehearing of the above entitled cause, and, in support
thereof, respectfully shows:

I.

This Court in its opinion dated December 16, 1940 re-
versed the judgment of the Supreme Court of Wisconsin
reported in 233 Wis. 286 (1940). As we apprehend the
substance of the opinion of the majority of this Court it
has held the Wisconsin Privilege Dividend Tax to be in

substance an additional or supplementary tax upon corporate income. In its opinion this Court said:

"* * * The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out."

"* * * * *

"Had Wisconsin, as part of its price for the privileges it afforded foreign corporations within its borders, explicitly provided for a supplementary tax on the Wisconsin earnings of such corporations, but postponed liability for the tax until such earnings were to be paid out in dividends, the power of Wisconsin to do so would hardly be questioned."
* * * "

This Court further stated that it would itself determine whether the tax transgressed constitutional barriers from its incidence and effect and not from the name given to it by the state legislature or its characterization by the Supreme Court of the state. Following the quotation above set forth it said:

"* * * But because the legislative language ran 'For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state' the court below raised the barrier of the Fourteenth Amendment. Respondent is a Delaware corporation having its principal offices in New York; its meetings are held in the latter state where the dividends are voted and the dividend checks are drawn on New York bank accounts. Since the process for declaring dividends and the details attending their distribution among the stockholders transpired outside Wisconsin, although the exaction was apportioned to the earnings derived from Wisconsin, the state

court concluded that the tax was an attempt by Wisconsin to levy an exaction on transactions beyond Wisconsin's borders.

"The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax.

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U. S. 276, 280.

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. . . ."

II.

We assume for present purposes that this Court is steadfast in its intent to pass upon the constitutional validity of the tax under consideration in the light of its substantial effect rather than upon the basis of the verbiage

used by the Wisconsin legislature and the construction placed upon it by the Supreme Court of Wisconsin. The point which we wish most particularly to stress upon a rehearing of this case is that if we are to look to the incidence and practical effect of the Privilege Dividend Tax, it must be regarded as an income tax collectible at the source imposed upon respondent's stockholders and not as a supplementary income or franchise tax imposed upon the corporation, and that it is accordingly unconstitutional as to stockholders residing outside of the State of Wisconsin. In other words our contention is that this Court after determining to look beyond the descriptive verbiage in which the tax was clothed erred in determining its true nature and incidence. We believe that this was undoubtedly due to the numerous other closely contested points involved in this case and to the fact that this crucial question upon which we now wish to be heard was, for reasons hereinafter set forth, neither briefed nor argued by counsel.

In the brief annexed hereto, we have presented the arguments with respect to which we wish to be heard further. We submit that if this case is to be disposed of upon the basis of the incidence and practical effect of the tax, the question before this Court for determination is not whether the State of Wisconsin may impose an additional income tax upon J. C. Penney Company but whether it can impose an income tax upon its non-resident stockholders and that upon rehearing this issue should be met and disposed of.

This question is dealt with in Point I of our annexed brief. We feel that the arguments there presented render it clear beyond question that the tax cannot properly be considered to be a corporate tax, and respectfully urge that the Court give them its careful consideration. In the event that this Court shall agree with our contention that the tax is invalid as to stockholders of the respondent residing outside of the State of Wisconsin, a satisfactory basis of apportionment is set forth in the record (R. 9).

Our reasons for urging that the tax is not in effect a corporate tax are based upon the provision in the law requiring the tax to be deducted from dividends payable to stockholders. It occurs to us that this Court may in its opinion have meant to hold that this provision of the law might be entirely disregarded. We respectfully submit, however, that such a ruling certainly is not logically proper. *Under the guise of determining the true incidence and effect of a state law it surely is not proper for this Court to alter the law to such an extent as to actually impose the tax upon a different person or entity than was obviously intended by the state legislature.*

There are several additional points which were either not made in our original brief or to which sufficient attention may not have been there devoted and with respect to which we would like to present further arguments. The first of these is that the incidence of the Privilege Dividend Tax is not upon the earning of income by the corporation and that if this Court has determined to abandon the distinction between subject and measure in the field of franchise taxation, the method adopted in dealing with a particular case should be to determine whether the tax is valid as a direct imposition and not to assume that it is because it was formerly considered proper to include its subject as an element in the measure of a franchise tax.

We have also indicated in the said brief under Point III that the language in this Court's opinion with respect to the exemption of dividends from personal income taxation in Wisconsin does not seem to us to be entirely accurate. The exemption is not allowed at all to stockholders of corporations such as respondent which derive less than fifty per cent of their income from Wisconsin. The law does not impose a progressive tax upon dividends as was the case in *Welch v. Henry*, 305 U. S. 134 (1938) and a careful comparison of it with the law there involved discloses that the Privilege Dividend Tax was carefully designed to allow

large stockholders in Wisconsin corporations to avoid paying a graduated personal income tax and surtax upon dividends received and not to remedy that situation as might be assumed from the opinion of this Court. We have also contended that the large burden and difficulties of administration which the tax imposes upon respondent are entirely unwarranted by the amount of tax collected.

In view of the summary of our argument here presented, we have not prepared a formal summary of argument as a part of the brief annexed hereto.

III.

The contention that the Privilege Dividend Tax is in substance a personal income tax upon stockholders was not dealt with in our principal brief because it seemed immaterial to the issues raised. In the brief filed on behalf of the State of Wisconsin and its Commissioner of Taxation the construction of the tax by the Supreme Court of Wisconsin was not attacked; there was no contention that the Privilege Dividend Tax should be construed as a supplementary income tax imposed upon corporations. The construction upon which this Court based its opinion first appeared in the form of a question which Mr. Justice Frankfurter asked counsel for the State upon the argument of the appeal.

The situation is, therefore, that the case was decided by this Court upon the basis of a construction which was never presented, briefed or argued by counsel except as it may have been argued extemporaneously by counsel in reply to questions of Mr. Justice Frankfurter. Were it not for the fact that a question of the constitutionality of a state statute was involved, it seems quite unlikely that this Court would have taken the initiative and reversed a judgment upon a ground contrary to the construction of the Court below, and not urged upon it by petitioners' counsel. Broader considerations may require the application of a different rule

in a case involving the constitutional validity of a state law. In the interest of an orderly and fair procedure, however, a rehearing should be permitted where the result of the deliberations of this Court is to dispose of a case of the highest importance upon a basis not presented by counsel. The very importance of the case which furnishes the reason that the adversary theory of litigation is not strictly followed, and the acknowledged difficulties and perils of a judicial construction of a law giving it effect under a theory other than that upon which it was designed likewise present sufficient reasons why this Court should not finally dispose of the case without a full presentation by counsel of the point which in view of the Court's opinion becomes the crucial question involved. We submit that these considerations are entitled to special weight in a case such as the instant one in which this Court was so nearly evenly divided; this is particularly true since one of the Justices hereof apparently disqualified himself in one of the cases presented at the same time as the instant case and which was subsequently decided upon the authority of the decision in the instant case.

We submit that counsel could not have been reasonably expected upon the basis of the brief filed on behalf of the petitioners and of prior proceedings in this case to suggest that the tax might be construed as a supplementary corporate income tax and then to brief their arguments as to why such a construction is unsound, and for this Court to fail to hear our arguments upon this point is to insist upon an unduly strict rule of anticipation.

We understand that petitions for rehearing are being prepared by Counsel for F. W. Woolworth Co., and Minnesota Mining and Manufacturing Company in the cases argued with the instant one (Nos. 47 and 48). In order to prevent useless duplication we have not included every point contained in the petitions and briefs to be filed on behalf of such parties but do hereby incorporate by refer-

ence any points made by them which are not included herein.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Supreme Court of Wisconsin be, upon further consideration, affirmed.

Respectfully submitted,

W. H. DANNAT PELL
ROSWELL DEAN PINE, JR.
Attorneys for Respondent.

CERTIFICATE OF COUNSEL

We, W. H. DANNAT PELL and ROSWELL DEAN PINE, JR. counsel for the above named J. C. Penney Company, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

W. H. DANNAT PELL
ROSWELL DEAN PINE, JR.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1940

No. 46.

STATE OF WISCONSIN and ELMER E. BARLOW, as Commissioner of Taxation of the State of Wisconsin,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

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Supreme Court of the United States,
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No. 46

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Petitioners,

vs.

**J. C. PENNEY COMPANY, a Delaware
Corporation,**
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
REHEARING.**

POINT I.

**The Privilege Dividend Tax is in its essential effect
an income tax upon the stockholders of respondent
and as such is unconstitutional with respect to dividends
paid to stockholders residing outside of Wisconsin.**

The Privilege Dividend Tax directs that the tax be de-
ducted and withheld from the dividends payable by the cor-
poration. In its opinion in *State of Wisconsin ex rel.
Froedtert G. & M. Co. Inc. v. Tax Commission*, 221 Wis. 225,
265 N. W. 672, 267 N. W. 52 (1936), the Supreme Court of
Wisconsin indicated that it thought the instant statute

similar to the New York income tax law involved in *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60 (1920), (see 221 Wis. 225 at p. 246).

Provisions for the collection of taxes at the source are common in income tax laws and the fact that a tax is collectible from the creditor of the person taxed and deducted from the amount of the debt does not change its legal effect. See Title 26, U. S. C. Sections 143, 144. Certainly there is no difference in substance between the Privilege Dividend Tax and an income tax upon stockholders collectible by the corporation as the agent of the state. On the other hand, we submit that there are very important differences in substance between the Privilege Dividend Tax and a supplementary corporate income tax.

The majority of this Court does not explain its reasons for believing the tax to be a corporate income tax notwithstanding the deduction provision. The only possible theory upon which it seems to us that this provision could be disregarded is that the stockholder ultimately bears the burden of corporate expenses and accordingly that an express direction that a particular expense be deducted from his dividend instead of disbursed from general corporate funds in the usual manner is immaterial.

The error of such a view is very forcefully presented by Arthur Leon Harding in an article in 25 California Law Review entitled "State Jurisdiction to Tax Dividends and Stock Profits to Natural Persons", in which the author criticizes the opinion of the Supreme Court of Wisconsin in the *Froedtert* case upon the ground that in its opinion in that case the Supreme Court of Wisconsin failed to recognize that the true effect of the law was to impose an income tax upon stockholders. As the reasoning of the author is quite as applicable to the opinion of this Court as to the opinion of the Wisconsin Court, to which it was expressly directed, we quote from it in some detail (page 158):

**"TAX ON DIVIDEND BASED ON POWER OVER
CORPORATION**

"Turning to corporate stock we find a similar situation. There is in the beginning an income to the corporation, taxable to the corporation at its place or places of business and in whole or in part at the state of incorporation. A part of this income in turn is passed on to the shareholder in the form of dividends. As such it represents in law an income to the shareholder quite distinct from the income to the corporation. The source of the income to the shareholder (the dividend) is the corporate stock. For a state to claim the right to tax the income on a theory of local source, it would have to establish that this immediate source, the corporate stock, is within its taxing jurisdiction. If this analysis be correct, a dividend representing income to a nonresident shareholder would not be subject to income taxation by a state claiming on the ground that it is the state of incorporation, or that the corporate business and property are located therein. A recent Wisconsin case approaches this issue. The court had previously adopted the approach here set forth, holding as a matter of statutory construction that interest paid a nonresident creditor by a resident debtor is not income from a source within the state. In the instant case the court affirmed its belief in the soundness of that case. Nevertheless, a 2½% tax on dividends was upheld. The reason assigned was that the tax did not purport to be an income tax, or in any way to be a tax upon the dividend or the shareholder, but was an excise tax 'for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in this state.' The excise was to be paid by the corporation and deducted from the dividend. *Right here the real question arises.* Concededly the state may tax domestic or foreign corporations on income derived from business done within the taxing state. Also there would appear to be no objection to measuring this tax by that part of the income distributed as dividends, rather than on the basis of total income. Where only one class

of shares is involved, the amount of the tax, being a proper deduction from profits or surplus before the declaration of dividends, will reduce the available dividend funds. In such a case the shareholder comes out about the same whether the tax is called a franchise tax on the corporation or a tax on the dividends. Within these limits and within them only can the holding of the Wisconsin court be sustained. But suppose the corporation has outstanding an issue of 6% preferred stock. May the directors declare a 6% dividend on the preferred and then declare a dividend on the common, at the same time withholding from the preferred shareholders the 2½% tax? If the Wisconsin statute is, as the court indicates, merely a malformed franchise tax then its amount is deductible from surplus for dividends along with other taxes and is ultimately to come out of the earnings on the common shares. The preferred shareholder would be entitled to his 6% if and when earned, without having his dividend diminished in this way. On the other hand if this be a tax on dividends, and if the state is to be held to have the right to tax the dividend, the right of the corporation to deduct its amount from the 6% declared will have to be upheld. This problem the Wisconsin court does not decide. By torturing the tax into a sort of franchise tax the court saved it in the instant case because, as pointed out, calling it a dividend tax does no real harm except where as here it misleads the taxpayer into instituting fruitless litigation. Legislative labels no longer decide cases. We may concede a certain excise tax jurisdiction. The state may tax the execution of writings within its borders. It may tax sales within its borders. It may tax corporate acts within its borders. However, the liability for such taxes falls upon the person doing the act within the taxing state. There is nothing in this excise tax idea empowering the taxing state as a matter of sovereign authority to create in the taxpayer of first instance a legal right of reimbursement against another person not present in, or acting in, or owning property in, the taxing state. There is nothing in the excise tax idea which would justify the taxpaying corpora-

tion in deducting the $2\frac{1}{2}\%$ tax from the 6% preferred stock dividend.

"Realizing no doubt the weakness of its position, the Wisconsin court sought to bolster its case by making an argument for local source of the income. It was sought to distinguish dividends from interest payments on the ground that the latter might not be earned by the debtor, and if earned, might be earned outside the taxing state. The dividend tax was applicable only to dividends actually earned within the state. The court in effect disregards the corporate fiction for the sole purpose of applying this tax and argues as though the income to the corporation really accrued to the shareholder in the first instance, while at the same time treating the corporation as a separate entity for other purposes. This 'now you see' it—now you don't' handling of the corporate fiction in order to sustain a multiplicity of taxes was proscribed in *Rhode Island Hospital Trust Co. v. Doughton*, an inheritance tax case. All the arguments used in the Wisconsin case, e. g., excise tax, tax on transfer as opposed to ownership, ultimate ownership, were advanced and refuted in the *Doughton* case, so that the matter appears to be settled. If some state should abolish the corporate fiction entirely, it would then be able to advance the local source idea with some hope for success."

It will be noted that the author approached the problem from exactly the same viewpoint as that of the majority of this Court, saying: "Legislative labels no longer decide cases". But his conclusion as to the real nature and incidence of the tax is exactly opposite that reached by this Court, and as Mr. Harding's language must be taken to be that of an impartial commentator rather than an advocate, it certainly merits careful study.

We submit that for the purpose of illustrating the difference between a corporate franchise or income tax and the Privilege Dividend Tax the example given by Professor Harding of a corporation having both common and preferred stock outstanding is particularly apt. Let us con-

sider the case of a corporation the income of which is just sufficient to meet the dividend requirements of its preferred stock and to pay a reasonable dividend on its common stock. If the corporate income tax is increased, this increase of corporate expense will result in there being less money available for the payment of dividends upon the common stock. Presumably the dividends upon the preferred stock will not be decreased. Certainly, if the preferred issue is cumulative, the preferred stockholder will be entitled to receive his dividend in full and undiminished by the amount of any tax which the corporation may have to pay before further dividends are paid to common stockholders.

The direction in the Privilege Dividend Tax, however, requiring that the tax be deducted from dividends paid has the effect of casting the incidence of the tax directly upon the preferred stockholder's dividend. Thus, if this tax be deemed a corporate tax, the deduction provision has the effect of destroying the fixed dividend rate to which the preferred stockholder is entitled before any payments are made upon common stock and requiring preferred stockholders to pay from their share of the corporate return a tax which under the corporate contract should be met from the general funds of the corporation. In the case of a foreign corporation the contract of such a preferred stockholder would be a foreign contract. Yet the State of Wisconsin seeks by its jurisdiction to impose a charge upon the corporation, to further require that the charge be paid by the preferred stockholder contrary to such contract. Certainly the State of Wisconsin can have no jurisdiction to require a non-resident preferred stockholder of a foreign corporation to forego his right of priority and to contribute to a corporate tax which under the corporate contract should be paid from general funds. *Royal Arcanum v. Green*, 237 U. S. 531 (1915); *Converse v. Hamilton*, 224 U. S. 243 (1912); *N. Y. Life Insurance Co. v. Head*, 234 U. S. 149 (1914); *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930).

If a preferred stockholder residing outside of Wisconsin files suit in another state contending that a corporate tax has been improperly deducted from his dividend, may the corporation successfully urge as a defense that Wisconsin has modified the corporate contract, when it has jurisdiction of neither the debt nor the person of the creditor and the corporation itself is incorporated in another state? Certainly such a defense would not be sound.

We submit that the above example shows in a manner too plain for controversy that the tax is not an income or franchise tax upon the corporation, but is clearly a personal income tax upon the stockholder. This is the only consistent view. The duty of this Court to sustain state legislation if possible can not be deemed to require it to close its eyes to the true incidence of the tax and call it a supplementary income tax, when it is such in neither fact nor name.

It may be asserted that J. C. Penney Company does not have any preferred stock outstanding and that accordingly it is not entitled to raise this question. We submit that the answer to such an assertion is that we are engaged in construing the law, and in order to determine its true construction are entitled to consider its application to various states of facts whether present in the instant case or not. Obviously the statute may not be construed as a supplementary corporate income tax in the instant case and a personal income tax upon stockholders in the case of a corporation which does have preferred stock outstanding.

The construction of the tax as a corporate tax raises substantially the same difficulty even though a corporation does not have preferred stock outstanding. When J. C. Penney Company declares a dividend it gives rise to a debt of a fixed amount. How in the absence of jurisdiction over the debt or the person of the creditor can the State of Wisconsin constitutionally require J. C. Penney Company to deduct from the stockholder's claim the amount of a tax which this Court has said is imposed upon it? Surely this

is an impairment of the obligation of the stockholder's contract and a failure to give full faith and credit to it as well as a violation of the due process clause.

There is another argument which shows very clearly that the incidence of the tax is upon the stockholder and not upon the earning of income by the corporation. The rate of tax in the law under consideration is $2\frac{1}{2}\%$. This rate was subsequently increased to 3%, which is applicable to dividends paid after June 30, 1939. See Chapter 198, Wisconsin Laws of 1939. This means that if a corporation paid out part of its 1935 earnings in 1936, it became liable for a "supplementary income tax" of $2\frac{1}{2}\%$, while, if it paid them out after June 30, 1939, it must pay a tax of 3% upon the same earnings. This shows too plainly for controversy that the burden of the tax is not upon the income of the corporation but is upon the income of the stockholder, who, in the case of dividends received after June 30, 1939, pays the higher rate because he received the income in a different tax period. Similarly, the law took effect on September 26, 1935. C. C. H. Corporation Tax Service, Wisconsin, Paragraph 15-001. Corporate income no matter when earned would go untaxed, if received by stockholders as dividends before that date; but, if declared and paid as a dividend after that date, would be taxed. For a ruling of the Wisconsin State Tax Commission which is interesting in this connection see C. C. H. Corporation Tax Service, Wisconsin, Paragraph 19-002.

The question as to whether the Privilege Dividend Tax is imposed upon the corporation or upon its stockholders is one which ultimately must be met. If the tax is a corporate income tax, the corporation is entitled to receive the income tax deductions allowed by federal and state laws for taxes paid. There is a certain inconsistency, however, in giving this deduction to the corporation when the corporation is legally required to pass the tax on to its stockholders.

The United States Treasury Department was called upon to decide whether the stockholder or the corporation was

entitled to the income tax deduction. It decided that the tax was upon the stockholders, saying (I. T. 3002 Cumulative Bulletin, XV-2, p. 142):

"The title of the law and its provisions show that it was the intention of the state legislature to levy an excise tax on the receipt of dividends and to make the corporation declaring and paying the dividends the collector of the tax for and on behalf of the state by requiring the corporation to withhold the tax from the stockholder and to pay the amount withheld to the State Tax Commission, which in turn pays it into the State Treasury.

"It is held that the Privilege Dividend Tax is an excise tax imposed upon the stockholder receiving the dividend who may deduct the amount of the tax in his Federal income tax return. . . ."

Although we have been unable to find an official ruling by the Wisconsin State Tax Commission under the state income tax law upon this point, the C. C. H. Corporation Tax Service for Wisconsin indicates at Paragraph 10-640.19 that on October 25, 1935, the State Tax Commission wrote a letter to the Corporation Trust Company taking a position in accord with that of the federal tax authorities.

In this connection the construction given to the law by the Wisconsin State Tax Commission in the case under consideration is interesting and significant. In preparing the first assessment against J. C. Penney Company the Tax Commission increased the rate of tax from the statutory rate of .025 to .025641 upon the ground that J. C. Penney Company by its failure to deduct the tax from the dividend, paid a tax which the law placed upon the stockholder and accordingly increased the dividend to that extent (R. 47, 48). It later altered this ruling, but we think it and the others mentioned are particularly pertinent since they represent the rulings of official agencies attempting to determine the incidence of the tax without regard to the description given to it, and in each case the conclusion reached was contrary to that of this Court.

We submit that a careful study of the brief filed on behalf of the State of Wisconsin will show that the analysis of its counsel comes very close to conceding that the tax is an income tax upon stockholders. At page 34 of their brief they say:

“ . . . No one can fairly argue that an excise upon the devolution of dividends is not an appropriate subject of taxation or that in and of itself the imposition of such an excise violates any provisions of the Federal Constitution. In fact such a transfer measures the fruits of corporate earnings transferred from a corporation to its members. And the transfer is fairly subject to a tax which has for its purpose the taxation of Wisconsin corporate earnings at the point they become subject to the enjoyment of those who conduct a corporate business for the purpose of acquiring and distributing such earnings among themselves.”

Again they state at page 52:

“Looking beyond the mere form of things it is evident that the stockholders of a corporation earning money within the State of Wisconsin, under the protection of its laws, for the purpose of distributing that money among themselves, may lawfully be required to pay something for the protection given them by the State of Wisconsin.”

These quotations show, as indeed does the language of this Court, that the law is regarded as the exaction of a tax at the time of the accrual of corporate profits to stockholders. *If Wisconsin may not directly impose its income tax upon income payable to nonresident stockholders of a foreign corporation, how possibly can a tax imposed upon the corporation at the time of its payment of a dividend to stockholders, which the corporation is required to deduct from the amount payable to stockholders, be sustained as different in substance?*

We submit that this Court after resolving to ignore the characterization of the tax by the Wisconsin court has itself erred in creating a fictional characterization. The decision of this Court has a strong intellectual appeal in its insistence that constitutionality be determined by trying to pass the physical dimensions of challenged legislation through the doors of propriety as established by the Constitution. It seems to us, however, that in its pursuance of and insistence upon this idea by which it seeks to reformulate certain fields of constitutional law this Court has overlooked certain details of the practical operation of the Privilege Dividend Tax which are here brought to its attention. *If we are to avoid fiction and look to the substance, as this Court has said we must do, the conclusion is absolutely inescapable that the question presented is the jurisdiction of Wisconsin to impose a personal income tax upon nonresident stockholders of foreign corporations and such a tax, we submit, is clearly unconstitutional.* *Domenech v. United Porto Rican Sugar Co.*, 62 Fed. 2d 552 (C. C. A. 1st. 1932) cert. denied 289 U. S. 739; *State Tax on Foreign Held Bonds*, 15 Wall. 300. (1872); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930); *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Newport Co. v. Wisconsin State Tax Commission*, 219 Wis. 293, 261 N. W. 884 (1936).

POINT II.

The incidence of the privilege dividend tax is upon the receipt of income by stockholders or upon the dividend transaction and not upon the earning of income.

At pages 36-38 of our original brief we took the position that the incidence of the Privilege Dividend Tax is upon the transaction of declaring and receiving dividends and not upon corporate earnings. The argument there set forth

is that since neither all nor substantially all income earned in Wisconsin is paid out in dividends the incidence of the tax rests upon the dividend transaction which gives rise to the liability, not upon the corporate earning which is remote and has little connection with it. As we have shown, some corporations may earn income in Wisconsin and lose it as a result of unprofitable operations elsewhere or may accumulate their income and later lose it as a result of unprofitable operations in later years.

We would certainly strongly contend that as a straight income tax the State of Wisconsin could not nominally impose a tax upon the earning of corporate income, but stipulate that liability for the tax and the rate paid should be determined (see page 16 hereof) by a declaration of dividends involving such income. So large a percentage of income would escape taxation that the tax could not be said to be reasonably designed as an income tax.

If it be said that the tax is upon Wisconsin income and that it is imposed if and when such income accrues to the enjoyment of stockholders, does this not define it as a tax upon the transaction or an income tax upon stockholders? *A tax may not be saved by naming a relatively unrelated transaction within the jurisdiction of the taxing authority as the subject of tax, if liability for the tax is actually determined by transactions taking place outside of the taxing jurisdiction.* The case resembles the law school tort cases upon the subject of proximate cause. The fact that a man is born is not the proximate cause of an automobile accident in which he may be involved though the accident would never have occurred had he never been born.

The majority of this Court have held, however, that the Privilege Dividend Tax is good because a franchise tax in which dividends paid from local income were taken into account as an element in calculating the value of the privilege taxed, would be valid. Franchise taxes have long been considered to be in a group by themselves. They do not rest upon the power of the state to tax directly the items included in the measure of the tax. In *Educational Films*

Corp. v. Ward, 282 U. S. 379 (1931), this Court said at page 392:

"Having in mind the end sought, we cannot say that the rule applied by this Court for some seventy years, that a non-discriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it, has failed of its purpose, or has worked so badly as to require a departure from it now; or that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule."

A certain inexactness in the measure has been permitted because the subject was considered proper. The operation of this rule is well illustrated by the recent case of *Ford Motor Co. v. Beauchamp*, 308 U. S. 331 (1939), in which this Court upheld a Texas franchise tax measured by a graduated charge upon such proportion of the outstanding capital stock, surplus and undivided profits of the corporation, plus its long term obligations, as the gross receipts of its Texas business bear to the total gross receipts from its entire business. Certainly this tax would not have been valid as an ad valorem tax, yet it was sustained in the form of a franchise tax.

If this Court has now determined to alter the rule laid down in *Educational Films Corp. v. Ward*, supra, and to treat the distinction between subject and measure of taxation as legally immaterial, the method adopted in dealing with a particular case must certainly be to consider whether or not the tax is valid as a direct imposition, not to assume that it is because it was formerly considered to be a proper element in the measure of a franchise tax.

The payment of dividends is simply one of the items which courts have held that it is proper to take into consideration in determining the charge to be assessed for the privilege of doing local business. As hereinbefore stated the incidence of the Privilege Dividend Tax is upon the receipt of income by stockholders or upon the dividend trans-

action and not upon the earning of income. Accordingly the fact that the State of Wisconsin may constitutionally tax the income of the respondent is insufficient to sustain the instant tax.

POINT III.

Practical aspects of the Privilege Dividend Tax.

- A. The Privilege Dividend Tax was expressly designed to perpetuate an income tax deduction pursuant to which stockholders of local corporations avoid liability for the progressive personal income tax and surtax on dividends received, not to remedy this situation as might be implied from the opinion of this Court.

In their decision the majority of this Court said:

" . . . The tax now assailed gains nourishing significance when placed in the context of the Wisconsin taxing system of which it became a part. Wisconsin relied heavily upon taxation of incomes and largely looked to this source to meet the increasing demands of the depression years. But a special Wisconsin feature was exemption of dividends from personal taxation. See *Welch v. Henry*, 305 U. S. 134, 142-43. This exemption persisted while regular and surtax rates against personal incomes were raised. Attempts at relief from the unfairness charged against this exemption of dividends, particularly advantageous to the higher brackets, were steadily pressed before the Wisconsin Legislature. To relieve local earnings of foreign corporations from a dividend tax would have had a depressive effect on wholly local enterprises. The Privilege Dividend Tax was devised to reduce at least in part the state's revenue losses due to dividend exemptions, and also to equalize the burdens on all Wisconsin earnings, regardless of the formal home of the corporation."

In the light of this language let us examine the tax structure to which this Court has referred. It is true that in

certain cases dividends paid by corporations are not taxable to the stockholder. The provisions of the Wisconsin income tax law dealing with dividends were summarized by this Court in *Welch v. Henry*, 305 U. S. 134, as follows:

"Wisconsin income tax legislation has from the beginning treated dividends received from corporations deriving a substantial part of their income from business carried on within the State, on which the corporations have paid a tax to the State, as a distinct class of income for tax purposes. At first complete tax immunity was granted to them. § 1, c. 658, Laws of Wisconsin, 1911. Later, the immunity was allowed ratably in the same proportion that the income of the corporation had been subjected to state income tax. § 1, c. 318, Laws of Wisconsin, 1923. And, finally, by amendment adopted in 1927 and in force in 1933 complete immunity of dividends from income tax was allowed if 50% or more of the total net income of the corporation paying them was included in the computation of the Wisconsin tax on corporate income" (p. 142). (Emphasis ours.)

From this it will be noted that the deduction is allowed to stockholders only in case more than fifty percent of the net income of the corporation is attributable to Wisconsin. This means, of course, that the exemption is not applicable to stockholders of respondent which receives between three and four percent of its total income from Wisconsin.

Apparently when the state required further revenue in 1935 the progressive tax on dividends received by stockholders in the year 1933, which was involved in the case of *Welch v. Henry*, 305 U. S. 134 (1938), was passed. This law was effective only with respect to dividend income for one year, the Privilege Dividend Tax being designed to take its place. It is obvious that the Privilege Dividend Tax was designed in order to retain a favored treatment for stockholders of domestic corporations (receiving more than fifty percent of their income from within the state) and yet at the same time to obtain a single small income tax on

dividends accruing to such stockholders. The income accruing to stockholders of most foreign corporations residing in Wisconsin bears three income taxes (corporate income, Privilege Dividend and personal income), while that of stockholders of most domestic corporations bears only two (corporate income and Privilege Dividend). The tax has the effect of imposing a double personal income tax upon resident stockholders of foreign corporations, yet, because of the deduction of one of the taxes at the source, the stockholder does not realize quite as clearly as he otherwise might that he is paying two taxes. The law, also, of course, has the virtue from the Wisconsin tax viewpoint of levying an imposition upon revenue going to non-resident stockholders of foreign corporations which would otherwise have been lost for tax purposes. If the States in which such non-resident stockholders reside impose an income tax, this income likewise bears three taxes.

From the foregoing it is plain that when the question of obtaining further revenue came before the Wisconsin legislature and exempt dividends of domestic corporations were suggested as a likely source of additional revenue, a scheme was devised which satisfied the state because it secured the revenue required and likewise satisfied the holders of large blocks of stock in local enterprises because they avoided the payment of the progressive income tax and the surtax which otherwise would almost certainly have been required. In other words, a compromise was entered into between politically potent Wisconsin interests at the expense of the stockholders of corporations such as the respondent which conduct less than half of their business within the state. *The Privilege Dividend Tax was designed not to correct the unfairness in regard to surtaxes mentioned by this Court, but to expressly perpetuate it.* For a further indication of the manner in which this law discriminates against foreign corporations see *Appeal of Cleaf Corporation*, C. C. H. Corporation Tax Service Wisconsin Par. 19-040 (Wisconsin Tax Commission 1939).

It seems possible to us that this Court in delivering its opinion may not have fully understood the exact terms of the dividend deduction permitted in the Wisconsin income tax law and its effect and we submit that this exposition should go far to destroy any particular significance which this Court may have discovered in considering the Privilege Dividend Tax in connection with the Wisconsin income tax system.

B. The Privilege Dividend Tax is Highly Impractical and Imposes an Extremely Severe and Uneconomic Burden Upon Corporations Such as the Respondent.

One of the principal reasons of respondent for bitterly contesting this law is the entirely unreasonable burden which the law casts upon it. This point has not been briefed though it has been asserted by respondent as a basis of invalidity of the law (R. 60). If Wisconsin has jurisdiction to impose the tax the burden imposed upon respondent seems at first glance to be little different from that imposed by sales tax laws upon vendors of merchandise. Actually, however, because of the extremely small sums and large number of calculations involved, the practical burden imposed upon respondent and other corporations similarly situated is very great in comparison to the sums realized by the state from the tax. We respectfully urge that the imposition of this burden is a violation of the due process clause of the United States Constitution.

While there is no evidence in the record, it is common knowledge of which this Court may take judicial notice that corporations whose stock is sold on stock exchanges for a number of years tend to have their stock held in many cases by persons holding small blocks of five, ten, fifteen, twenty and twenty-five shares. This is true because small investors do not have a great deal to invest and ordinarily wish to diversify their holdings. Furthermore, large blocks of stock owned by the original organ-

izers of an enterprise tend to become split up as a result of gifts and the distribution of estates among numerous next of kin or legatees. Some idea of the dispersion which takes place can be gained by a reference to Exhibit 5 opposite R. 50 showing the dispersion of respondent's stockholders over the forty-eight states of the Union. Furthermore it will be noted that on each successive dividend date the number of stockholders was greater.

In order to demonstrate in a concrete way the burden imposed upon respondent by this law, let us determine the amount of tax deductible from the regular quarterly dividend of seventy-five cents in the case of a five share block of J. C. Penney Company stock. The stockholder is entitled to receive a total of \$3.75. In 1936 according to the presumption about 3.9% of this was attributable to Wisconsin earnings; thus the total alleged Wisconsin earnings entering into the dividend were about $14\frac{1}{2}\%$ upon which the corporation was required to assess a tax of 2.5%. On this five share block, therefore, the tax would be about \$0.00365. It is plain that in such a case a deduction would be impossible. It would require a fifteen share block of stock having a present market value of about \$1300 before the dividend deduction would amount to 1¢. The large number of stockholders of the respondent renders it apparent that there must be a great number of stockholders who own five, ten or fifteen share blocks of stock. It must be clear that the task of making equitable deductions would be exceedingly difficult.

Unfortunately there is likewise nothing in the evidence to show in any exact way the accounting costs which must necessarily be imposed upon the corporation. It is difficult to imagine, however, that a corporation could hire employees to take care of calculating and deducting the tax at less than three to five cents a transaction. If we assume that the cost is four cents per transaction it means that except in cases of blocks of stock of more than sixty shares, it costs the corporation more to make the deduction than the

state receives in taxes. This also involves a troublesome situation. The corporation might make the deduction in the case of large stockholders and not in the case of small ones, but this policy is hardly fair and would almost certainly involve it in difficulties with the large stockholders. On the other hand, if the corporation does not make the deductions at all, it cannot under federal and state rulings get the benefit of income tax deductions for taxes paid and must run the risk of attack from stockholders upon this ground.

By this time persons associated with corporate management are pretty well reconciled to the fact that corporate taxes may be expected to be high and burdensome. Most large corporations have departments containing a number of employees whose sole duties are to compile the necessary figures for and prepare tax returns required by federal, state and city tax laws. If the Privilege Dividend Tax were in fact a supplemental corporate income tax, it could be administered entirely upon the basis of returns already required and would not be nearly so objectionable. From the foregoing, however, it is plain that instead of being an economic exaction designed to obtain the largest amount of revenue with the least confusion, its practical effect is to obtain a relatively small amount of revenue in comparison to the additional corporate expense entailed.

This Court has shown considerable reluctance to overthrow a piece of poorly designed and drawn state legislation upon the theory that in this decade of high governmental expenses legislative efforts to raise the revenue required should not be hampered. It must be clear, however, that the economic waste entailed in declaring this uneconomic law unconstitutional and requiring the state to adopt a proper plan of taxation, as it unquestionably may under the decisions of this Court, is far less than that involved in requiring the respondent and other corporations to increase their staffs to comply with this law and to face the same situation again and again as other state legislatures searching for additional "painless and hidden"

sources of revenue may be led by the precedent of this case to enact similar laws.

We respectfully submit that the judgment of this Court should be vacated and the judgment of the Supreme Court of Wisconsin should be affirmed.

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PS

SUPREME COURT OF THE UNITED STATES

No. 46.—OCTOBER TERM, 1940.

State of Wisconsin and Elmer E. Barlow as Commissioner of Taxation of the State of Wisconsin,
vs.
J. C. Penney Company,

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

[December 16, 1940.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Whether the tax imposed by § 3 of Chapter 505 of the Wisconsin Laws of 1935 may apply to a foreign corporation licensed to do business in Wisconsin without offending the Fourteenth Amendment of the Constitution is the question before us. The statute is quoted in the margin.¹ When this question originally came before the Supreme Court of Wisconsin it found no constitutional infirmity in such an exaction. *State ex rel. Froedtert G. & M. Co. v. Tax Commission*, 221 Wis. 225. But deeming itself constrained by its reading of this Court's decision in *Connecticut General Co. v. Johnson*, 303 U. S. 77, the Wisconsin Supreme Court in the present case found that the statute ran afoul the Due Process Clause insofar as it covered locally licensed foreign corporations. 233 Wis. 286.

¹ Section 3, Chapter 505, Laws of Wisconsin, 1935, as amended by Chapter 552, Laws of Wisconsin, 1935:

"Section 3. Privilege Dividend Tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation.

"(2) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the tax commission, reporting such tax on the forms to be prescribed by the tax commission.

"(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof

Inasmuch as important issues affecting the exertion of the taxing power of the states are involved, we brought this and its companion cases here. 310 U. S. 618, 619.

For many years, corporations chartered by other states but permitted to carry on business in Wisconsin have been subject to a general corporate income tax act on earnings attributable to their Wisconsin activities. The state has, of course, power to impose such a tax. *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321; *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113. "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in" Wisconsin, an exaction "equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local)" is the additional tax now before us. In the enforcement of this measure against foreign corporations, the amount of income attributable to Wisconsin is calculated according to the same formula as that employed in assessing the general corporate income tax paid by such foreign corporations. The practical operation of this legislation is to impose an additional tax on corporate earnings within Wisconsin but to postpone the liability for this tax until such earnings are paid out in dividends. In a word, by its general income tax

to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the tax commission shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

"(5) Dividends paid by a subsidiary corporation to its parent shall not be subject to the tax herein imposed provided that the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

"(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders.

"(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

"(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

"(9) The tax hereby imposed shall, when collected by the tax commission, be paid by it into the state treasury."

Wisconsin taxes corporate income that is taken in; by the Privilege Dividend Tax of 1935 Wisconsin superimposed upon this income tax a tax on corporate income that is paid out.

As pressures for new revenues become more and more insistent, ways and means of meeting them present to a state not only the baffling task of tapping fresh sources of revenue but of doing so with due regard to a state's existing taxing system. The tax now assailed gains nourishing significance when placed in the context of the Wisconsin taxing system of which it became a part. Wisconsin relied heavily upon taxation of incomes and largely looked to this source to meet the increasing demands of the depression years. But a special Wisconsin feature was exemption of dividends from personal taxation. See *Welch v. Henry*, 305 U. S. 134, 142-43. This exemption persisted while regular and surtax rates against personal incomes were raised. Attempts at relief from the unfairness charged against this exemption of dividends, particularly advantageous to the higher brackets, were steadily pressed before the Wisconsin Legislature. To relieve local earnings of foreign corporations from a dividend tax would have had a depressive effect on wholly local enterprises. The Privilege Dividend Tax was devised to reduce at least in part the state's revenue losses due to dividend exemptions, and also to equalize the burdens on all Wisconsin earnings, regardless of the formal home of the corporation.

Had Wisconsin, as part of its price for the privileges it afforded foreign corporations within its borders, explicitly provided for a supplementary tax on the Wisconsin earnings of such corporations, but postponed liability for the tax until such earnings were to be paid out in dividends, the power of Wisconsin to do so would hardly be questioned. Compare *Continental Assurance Co. v. Tennessee*, No. 117 this Term, decided Oct. 21, 1940. But because the legislative language ran "For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state" the court below raised the barrier of the Fourteenth Amendment. Respondent is a Delaware corporation having its principal offices in New York; its meetings are held in the latter state where the dividends are voted and the dividend checks are drawn on New York bank accounts. Since the process for declaring dividends and the details attending their distribution among the stockholders transpired outside Wisconsin, al-

though the exaction was apportioned to the earnings derived from Wisconsin, the state court concluded that the tax was an attempt by Wisconsin to levy an exaction on transactions beyond Wisconsin's borders.

The case thus reduces itself to the inquiry whether Wisconsin has transgressed its taxing power because its supreme court has described the practical result of the exertion of that power by one legal formula rather than another—has labeled it a tax on the privilege of declaring dividends rather than a supplementary income tax.

A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." *Henderson v. Mayor of N. Y.*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that "in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it". *Lawrence v. State Tax Commission*, 286 U. S. 276, 280.

The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if, by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.

Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. "Taxable event", "jurisdiction to tax", "business situs", "extra-

territoriality", are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction. See *Continental Assurance Company v. Tennessee*, *supra*. See also *Equitable Life Society v. Pennsylvania*, 238 U. S. 143; *Maxwell v. Bugbee*, 250 U. S. 525; *Compañia de Tabacos v. Collector*, 275 U. S. 87, 98; *New York ex rel. Cohn v. Graves*, 300 U. S. 308; *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22; *Curry v. McCantess*, 307 U. S. 357.

This analysis is merely a reformulation of the classic approach of this Court to the taxing power of the states. *Lawrence v. State Tax Commission*, *supra*, p. 280. Ambiguous intimations of general phrases in opinions torn from the significance of concrete circumstances, or even ~~an~~ occasional deviation over a long course of years, not unnatural in view of the confusing complexities of tax problems, do not alter the limited nature of the function of this Court when state taxes come before it. At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but

merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.

Nor does *Connecticut General Co. v. Johnson*, *supra*, present a barrier against what Wisconsin has done. Its presuppositions recognize the scope of the state taxing power we have outlined. 303 U. S. 77, 80, 82. In the precise circumstances presented by the record it was found that the tax neither in its measure nor in its incidence was related to California transactions. Here, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible, insofar as government is the prerequisite for the fruits of civilization for which, as Mr. Justice Holmes was fond of saying, we pay taxes. See, for instance, his dissent in *Compañía de Tabacos v. Collector*, *supra*, p. 100.

Because the Wisconsin Supreme Court found the statute to be invalid as to foreign corporations in the position of the respondent it had no occasion to pass on certain claims relating to the application of the statute to the specific dividends here involved. We therefore remand the case for the determination of such questions as are open in the light of this opinion.

Reversed and remanded.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 46.—OCTOBER TERM, 1940.

State of Wisconsin and Elmer E.
Barlow, as Commissioner of Taxa-
tion of the State of Wisconsin,
Petitioners,

vs.

J. C. Penney Company.

On Petition for Writ of Cer-
tiorari to the Wisconsin Su-
preme Court.

[December 16, 1940.]

Mr. Justice ROBERTS.

I assume that the principle still holds good that a state, a member of the sisterhood of states in the Republic, cannot extend her sovereignty by legislation so as to prohibit, to regulate, or to tax property or transactions of citizens of other sovereign states lying outside her boundaries and regulated by the law of the state of domicile or residence. I assume also that, where a state has, by law, fixed the conditions upon which a corporate citizen of another state may enter to transact business, she may not thereafter extend her sovereignty to matters not within her competence, in the guise of annexing other and further conditions or burdens upon the transaction of the corporation's business within her borders. Those activities which have a real and substantial relation to the business transacted by the citizen of another state within her confines are, of course, subject to regulation and to taxation. It would be mere affectation to cite the adjudications of this court which are founded upon these propositions. I have thought that these principles were of the very warp and woof of the constitutional system which binds the states together in a federal union. Attempted transgressions of these limits of state sovereignty have time and again run afoul of the Fourteenth Amendment.

The respondent admittedly receives income in Wisconsin. No one questions the power of Wisconsin to lay a tax upon the receipt of that income. It has done so. It is said that the challenged exaction is merely an additional income tax,—this, notwithstanding

that the tax is not called an income tax, has been held by the highest court of Wisconsin not to be an income tax but an excise upon a privilege,—in the view that in testing the constitutionality of an exaction this court examines for itself the nature and incidence of the tax and disregards mere names and descriptive epithets. With that principle I have no quarrel, but I think the opinion of the court demonstrates that the tax here in question is, and can be, sustained only by a disregard of it. Let me illustrate my meaning. Assuming that, by statute, an ad valorem tax on property is prohibited and an income tax permitted. The terms used in the statute necessarily have a conventional connotation. One cannot intelligently discuss things or actions except by using the names commonly employed to describe them: Concepts of ad valorem taxation on property and taxation of income are clear and easily discriminable. What would be said of a decision construing such a statutory provision so as to hold a tax of so many cents on the dollar upon property an income tax because, forsooth, all the property assessed has been received as the fruits of labor, of industry, or of capital, upon the theory that, as the property had come into existence at some remote date as income, the tax was an income tax? I think that is precisely what has been done in this case.

The facts are not in dispute. The respondent receives income in many states. That income is forwarded to its home office, after bearing whatever tax is laid upon its receipt in the state of receipt. Thereupon the funds so forwarded become a portion of the general mass of the respondent's property, held and administered at its general office. The funds may be employed in the extension of its business; they may be held as insurance against future business losses or they may be distributed to its stockholders in dividends. Their management and their disbursement have no relation to the original receipt of income save only the fact that, like most property, they are built up as the fruits of income. Their use and their disbursement does not depend on any law of Wisconsin and cannot be controlled by any such law. The act of disbursing them, whether in payment of corporate obligations or as dividends, is one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition. That distribution cannot be the subject of an excise tax by the State of Wisconsin. So much the state admits.

Under the challenged statute, a presumption is created which is shown in the case of the assessment against the respondent for the years in question to be contrary to the fact,—namely, that an arbitrarily assumed proportion of the dividend is paid out of the respondent's earnings in Wisconsin for the year immediately preceding the payment of such dividend. By the very terms of the Act, the tax is laid not on the corporation but on the stockholder receiving the dividend and, by confession, thousands of such stockholders are not residents of Wisconsin. The corporation is the mere collector of the tax and the penalty for failure to collect it is that the corporation must pay it. If the exaction is an income tax in any sense it is such upon the stockholder and is obviously bad. It cannot, except by a perversion of the term and the affixing of an arbitrary label, be denominated a tax upon the income of the respondent.

The explanation of the reason and purpose for imposing the tax disclosed in the opinion of the court, serves to condemn it. If Wisconsin found that dividend income of stockholders of domestic corporations escaped taxation, and should bear it, an effective way to reach the dividend receipts of the stockholders of such corporations was to place a tax upon the receipt of dividends by them. But such a levy upon the stockholders of a foreign corporation, not resident within Wisconsin, obviously was impossible although that is exactly what was attempted by the statute in question. We are now told that this is not a fair exposition of the law but that, on the contrary, and in the teeth of the known facts, what Wisconsin did was to lay a supplementary income tax upon foreign corporations. This is simply to take the name of a well understood concept and assign that name as a label to something which in ordinary understanding never fell within such concept. By this process any exaction can be tortured into something else and then justified under an assumed name.

The respondent owns property in various states of the Union. It is reasonable to suppose that much of that property has been purchased out of corporate surplus, that is, out of past earnings. An ad valorem tax by Wisconsin on property so acquired could be quite as easily justified under the label of an income tax because the property represented income once received, as the present tax, on the declaration and receipt of dividends out of earned surplus.

Upon the facts, the tax is levied on what lies outside the sovereignty of Wisconsin. Its attempted collection is a violation of

the Due Process Clause of the Fourteenth Amendment and should be stricken down.

The Supreme Court of Wisconsin could not have decided otherwise in the light of a recent expression of this court on the subject. In reaching its decision it professedly followed and applied *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77. There a Connecticut life insurance company did business in California under license from that state. It entered into contracts with other insurance companies, also licensed to do business in California, reinsuring them against loss on policies written by them in California on the lives of California residents. The contracts were made in Connecticut, premiums were paid there, and the losses, if any, were there payable. California imposed a tax upon the privilege of the company to do business within California. The tax was measured by the gross premiums received. California officials attempted to collect the tax on the premiums received by the Connecticut corporation under the reinsurance contracts in question. The Supreme Court of California sustained the tax. In that case, as in this, the highest state court described and defined the tax. There the tax was denominated "a franchise tax enacted for the privilege of doing business in the state." Here, the Supreme Court of Wisconsin has denominated the exaction as a privilege or excise tax imposed upon the transfer of property. By the very process the court now professes to employ of disregarding the name given to the tax by the state court, this court, in the *Connecticut General Life Insurance Co.* case, reached the conclusion that the State of California could not impose the tax on the activities of the Connecticut company which were not within its jurisdiction. Citing many decisions of this court, it was there said:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state."

The very argument now invoked in support of the present decision was repudiated by the court in the *Connecticut* case in these words:

"It is said that the state could have lawfully accomplished its purpose if the statute had further stipulated that the deduction should be allowed only in those cases where the reinsurance is

effected in the state or the reinsurance premiums paid there. But as the state has placed no such limitation on the allowance of deductions, the end sought can be attained only if the receipt by appellant of the reinsurance premiums paid in Connecticut upon the Connecticut policies is within the reach of California's taxing power. Appellee argues that it is, because the reinsurance transactions are so related to business carried on by appellant in California as to be a part of it and properly included in the measure of the tax; and because, in any case, no injustice is done to appellant since the effect of the statute as construed is to redistribute the tax, which the state might have exacted from the original insurers but did not, by assessing it upon appellant to the extent to which it has received the benefit of the allowed deductions."

In describing the incident of the void tax this court said, as it might with equal accuracy be said of the instant tax:

"Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection."

And finally the court concluded:

"All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

I think that the judgment below should be affirmed.

The CHIEF JUSTICE, Mr. Justice McREYNOLDS and Mr. Justice REED concur in this opinion.

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